IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-244

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a
Nevada corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SHAFTON
1800 Century Park East
Los Angeles, Ca. 90067
(213) 879-2177

Attorney for Petitioner

TYRE & KAMINS

PETER M. APPLETON

Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. _____

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a
Nevada corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. SHAFTON
1800 Century Park East
Los Angeles, Ca. 90067
(213) 879-2177

TYRE & KAMINS — Attorney for Petitioner

PETER M. APPLETON

Of Counsel

TOPICAL INDEX

	Page
Table of Authorities	ii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	4
STATUTE AND RULES INVOLVED	4
STATEMENT OF THE CASE	5
1. Proceedings Before the District Court	5
2. Decision of the Court of Appeals	7
A. Summary Judgment Procedure	7
B. Application of State Law	11
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	25.

		Page
APPENDIX A	OPINION March 31, 1976 U.S. Court of Appeals Ninth Circuit	
APPENDIX B	ORDER Filed May 21, 1976 U.S. Court of Appeals Ninth Circuit	
APPENDIX C	Motion for Summary Judgment Granted Dec. 17, 1974	
APPENDIX D	Federal Rules of Civil Procedure, Rule 56, Summary Judgment	
APPENDIX E	California Business and Professions Code Sec. 7031	
APPENDIX F	Rehearing Denied Jan. 13, 1959	

TABLE OF AUTHORITIES

Cases	Page
Brummel v. Whelpley, 46 Mich.App. 93, 207 N.W.2d 399 (1973)	23
Curry v. Fred Olsen Line 367 F.2d 921, 924, (9th Cir. 1966)	15
Dahl-Beck Elect. Co. v. Rogge, 275 Cal.App.2d 893, 80 Cal.Rptr. 440 (1969)	13
Eklund v. Elwell, 106 Utah 521, 211 P.2d 849 (1949)	18, 20
Ernst & Ernst v. Hochfelder ___ U.S. ___, 47 L.Ed.d 688 (1976)	25
Frank v. Kozlovsky 13 Cal.App.3d 120, 91 Cal.Rptr. 297 (1970)	22
Hunter v. Sutton 45 Nev. 430, 205 Pac. 785 (1922)	15
King v. United Commercial Travelers, 333 U.S. 153, 92 L.Ed. 608 (1947)	14
Latipac, Inc. v. Superior Court 64 Cal.2d 278, 49 Cal. Rptr. 676, 411 P.2d 564 (1966)	12, 22

	Page
Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1959)	12, 15, 19, 21
Milum v. Herz Bros. Water Well Drilling & Supply Co., 74 Nev. 309, 312, 329 P.2d 1068 (1958)	13
Miller v. Superior Court 8 Ariz.App. 420 466 P.2d 699 (1968)	23
National Hockey League v. Metropolitan Hockey Club ____, U.S. ____, ____ L.Ed.2d ____ (1976) (No. 75-1558)	16
Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968)	12, 21, 22
Ormachea v. Ormachea 67 Nev. 273, 288-90 217 P.2d 355, 363-64 (1950)	14, 15
Pickens v. American Mortgage Exchange, 269 Cal.App.2d 299, 74 Cal.Rptr. 788(1969)	20
Platz, In re 60 Nev. 296, 304 108 P.2d 858, 862 (1940)	12

	Page
Schlagenhauf v. Holder 379 U.S. 104, 13 L.Ed.2d 152 (1964)	16
Utter v. Casey 81 Nev. 268 401 P.2d 684 (1965)	24

Statutes

Arizona Revised Statutes	
§ 32-11-51	17
§ 32-11-53	18
California Business and Professions Code	
§ 7028 (West 1975)	17
§ 7031 (West, 1975)	11, 18
Nevada Revised Statutes	
§ 3.190	14
§ 624.230	17
§ 624.320	4, 5, 11, 12, 17, 21
§ 624.330	24
Chapter 623, Statutes of Nevada (1975) amending NRS § 624.330(9)	24

	Page
New Mexico Statutes Annot.	
§ 67-35-15	17
§ 67-35-33	11, 18
28 United States Code	3
§ 1254(1)	
§ 1292(b)	3
§ 1332	3
Utah Statutes Annot.	
§ 58-23-1	17

Constitution

Nevada Constitution	
Article 6, § 6	14

Rules

Federal Rules of Civil Procedure	
Rule 56	4, 16
Nevada Rules of Civil Procedure	
Rule 54(b)	14
Nevada Supreme Court	
Rule 244	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. _____

UNITED PACIFIC INSURANCE COMPANY,
a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a
Nevada corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, United Pacific Insurance Company, a Washington corporation ("United"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 31, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals has been officially reported at 533 F.2d 486 and it appears at Appendix A, infra, pp. 1-7. The order of the Court of Appeals denying the petition for rehearing has not been officially reported and it appears at Appendix B, infra, pp. 1-2.

The decision of the District Court is reported at 65 F.R.D. 624 and it appears at Appendix C, infra, pp. 1-53.

JURISDICTION

On December 17, 1974, the United States District Court for the District of Nevada filed its order granting a Motion for Summary Judgment previously filed jointly by Petitioner and Imperial Glass Company ("Imperial")[1/] and on December 31, 1974, entered judgment dismissing the complaint of Respondent, MGM Grand Hotel, Inc. ("MGM").

1/ Imperial filed a petition on February 11, 1976 in the United States District Court for the Central District of California stating that it desired to effect a plan under Chapter 11 of the Bankruptcy Act and is not a party to this petition.

On December 31, 1974, at MGM's request, the District Court amended its December 17, 1974 order to comply with the requisites for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and on February 10, 1975, the Court of Appeals granted MGM leave to appeal.

The judgment of the Court of Appeals reversing the District Court was entered on March 31, 1976, and a timely petition for rehearing was denied by the Court of Appeals on May 21, 1976. This Petition for Certiorari is filed within 90 days after that date.

This action was brought in the District Court by MGM, a Nevada corporation, against Imperial, a co-partnership consisting of persons who are citizens of California, and United, a Washington corporation. Federal jurisdiction was invoked on the basis of diversity of citizenship between the parties, 28 U.S.C. § 1332.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is a party who makes an unsuccessful motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") precluded from disputing at trial the truth of the matters set forth in its opponent's opposition papers?

2. Did the Court of Appeals properly apply Nevada law when it concluded that MGM's failure to obtain a Nevada contractor's license did not bar MGM from prosecuting its claim against Imperial and United?

STATUTE AND RULES INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure and § 624.320 of Nevada Revised Statutes ("NRS"), the pertinent parts of which appear at Appendix D, infra, pp. 1-7.

STATEMENT OF THE CASE

1. Proceedings Before the District Court

This case arose out of the construction of the MGM Grand Hotel in Las Vegas, Nevada, one of the largest resort hotels in the world, a construction project costing in excess of one hundred million dollars. Imperial contracted with MGM to construct a portion of the building for $2,325,000. United posted a performance bond on Imperial's behalf.

Approximately half way through the job, MGM, contending that Imperial had not performed its contract properly, purported to terminate the contract and on April 20, 1973, brought suit against Imperial and United in the District Court.

On May 14, 1974, Imperial and United filed their motion for summary judgment contending that MGM could not sue because it was not a licensed contractor citing NRS §624.320 which in substance provides that no person acting in the

capacity of a contractor[2/] may maintain an action for the "collection of compensation for the performance of any act or contract for which a license is required" unless such person was licensed. (See Appendix D, infra, pp. 6-7).

Among other things, the motion was supported by portions of the deposition of Fred Benninger, MGM's Chairman of the Board (in which Mr. Benninger testified as to the role he had played in connection with the job) and by the parties' contract.

MGM admitted that it was not licensed but contended that there were issues of fact which precluded the entry of a summary judgment. District Judge Foley, the former Nevada Attorney

---

2/ At the Court of Appeals, MGM contended that a license was not required of it because it was not "in the business of acting as a contractor." However, the Court of Appeals did not decide the issue (Footnote 4, 533 F.2d at 488, Appendix A at p. 3).

General, held that Nevada law required MGM to have a license, absent which MGM's suit could not be maintained, and granted the motion for summary judgment. (65 F.R.D. 624, Appendix C).

2. Decision of the Court of Appeals

In an opinion by Circuit Judge Ely, joined in by Circuit Judge Koelsch and District Judge Jameson, the Court of Appeals reversed Judge Foley's summary judgment, not on the ground that there were unresolved questions of fact which precluded its entry, but rather the court held that as a matter of law (on which the Nevada Supreme Court has not spoken directly) MGM could maintain the suit notwithstanding that it was acting in the capacity of an unlicensed contractor.

A. Summary Judgment Procedure

The decision below appears to have precluded Petitioner from contesting at trial the "facts" set forth in MGM's opposing affidavits. MGM did not move for summary judgment. Thus, Imperial

and United were not obligated to oppose at that time the factual contentions set forth in MGM's affidavits. Yet, the adoption in the decision below of the contentions set forth in those opposing affidavits to support the decision that as a matter of law MGM did not need a license, is the exact opposite of the ordinary summary judgment situation, the practical result of which is that MGM won a partial summary judgment although it not only never made such a motion but on the contrary contended throughout that there were genuine issues of fact which precluded the granting of such a motion.

Specifically, the Court of Appeals' opinion (533 F.2d at 488, Appendix A at p. 3) states (without identifying them) that there were genuine unresolved issues of material fact. However, it then concluded that notwithstanding unresolved issues of fact,as a matter of law MGM did not need a license.

"MGM concedes that it is not a licensed contractor; however, it contends that the statute has been satisfied by the undisputed fact that Taylor is a

licensed contractor. We agree." (Opinion, 533 F.2d at 488, Appendix A at p. 3).

"We conclude that Imperial is not, as a matter of law, entitled to prevail." (533 F.2d at 488, Appendix A at p. 3).

It is clear that the decision below rests on MGM's version of the facts as set forth in the opposing affidavits:

> "Similarly, the arrangement between MGM and Taylor substantially complied with the Nevada licensing scheme. To the extent that licensing protects the public against faulty construction, the public was adequately protected by the fact that Taylor, who had total responsibility for supervising construction of the hotel, was a licensed contractor . . . Looking to the realities of MGM's financial status, there is absolutely no suggestion in the record that MGM is financially irresponsible. Indeed, it was to exploit the strong financial position of MGM's parent corporation that the managing contractor arrangement was adopted by

by MGM. Moreover, because MGM is operating hand in hand with a licensed contractor, the Nevada Contractor's Board is in a position to monitor the progress of construction should there arise any doubt about the financial stability of the project. Thus, a policy of protecting the public would in no way be furthered by imposing upon MGM such a harsh penalty as barring it from bringing its suit." (533 F.2d at 489-90, Appendix A, at pp. 5-6).

Thus, it would appear from the decision below that by virtue of having made a motion for summary judgment, Imperial and United are now precluded from litigating at trial the facts on which the decision below presumably rests, namely (1) whether Taylor, a licensed contractor, had total responsibility for supervising construction and (2) whether MGM was financially irresponsible.

This result, which Petitioner called to the attention of the Court of Appeals in the petition for rehearing, serves to penalize the maker of a motion for

summary judgment and is without precedential support.

B. Application of State Law

Admittedly, the Court of Appeals was dealing with a question never directly answered by the Nevada Supreme Court. However, the decision below is directly contrary to all available indicia of what the Nevada Supreme Court would have done in this situation.

First, New Mexico and California have statutes which bar suits by unlicensed contractors. Those statutes, § 7031 of the California Business and Professions Code (West, 1975), and § 67-35-33 of New Mexico Statutes Annot., appear at Appendix E. The terms of those statutes are virtually identical to NRS § 624.320.

As the decision below recognized (533 F.2d at 490, Appendix A at p. 6, Footnote 11 and text accompanying), the appellate courts of those states have held a suit to be barred under these same circumstances.

Second, Nevada Supreme Court cases dealing with NRS § 624.320 have relied

almost totally on California precedent.

In Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1959), cited in the decision below (Footnote 6, 533 F.2d at 489, Appendix A, at p.4), which appears at Appendix F. pp. 1-18, the Nevada Supreme Court held that a suit by an unlicensed contractor on the contract was barred by NRS §624.320 but that one based on fraud was not. The precedent cited was six California intermediate appellate cases (333 P.2d at 719-20, Appendix F at pp. 11-12).

In Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968), primarily relied upon in the decision below (Footnotes 6 and 7, 533 F.2d at 489-90, Appendix A at p. 4), which appears at Appendix F, pp. 18-26, the Nevada Supreme Court relied on Latipac, Inc. v. Superior Court, 64 Cal. 2d 278, 49 Cal.Rptr. 676, 411 P.2d 564 (1966), a California Supreme Court case, and on Magill v. Lewis, supra (440 P.2d at 123, Appendix F at pp. 24-25).

Third, see In re Platz, 60 Nev, 296, 304, 108 P.2d 858, 862 (1940) where the

Nevada Supreme Court held that the interpretation of the provisions of a statute by the appellate courts of a sister state will be given great weight by Nevada courts in construction of similar Nevada statutes.

The refusal of the Court of Appeals to apply California and New Mexico precedent constitutes an unexplained and unsupported departure from the long standing practice of the Nevada Supreme Court. The reference in the decision below (Footnote 12, 533 F.2d at 490, Appendix A at p. 6 to a statement in Milum v. Herz Bros. Water Well Drilling & Supply Co., 74 Nev. 309, 312, 329 P.2d 1068, 1069 (1958), that failure to obtain a contractor's license will not prevent the unlicensed person from defending a lawsuit, does not suggest that the Nevada Supreme Court would fail to follow California precedent because Milum is in accord with California law. See e.g., Dahl-Beck Elect. Co. v. Rogge, 275 Cal. App.2d 893, 903, 80 Cal.Rptr. 440 (1969) and cases cited therein.

Finally, instead of following the

trend established by the Nevada Supreme Court in the cases cited above, the decision below appears to rely on a Nevada trial court's criticism of the District Court's decision in this case after it was made (Footnotes 5 and 9, 533 F.2d at 489-90, Appendix A at pp. 4-5). However, that trial court decision is not controlling precedent in Nevada and should not have been considered. King v. United Commercial Travelers, 333 U.S. 153, 161, 92 L.Ed. 608, 613 (1947).

The Nevada trial court rendered its decision in denying a motion for summary judgment. A decision denying a motion for summary judgment is not a final judgment and may be reexamined at trial. Nev. Rules Civ. P., Rule 54(b); Ormachea v. Ormachea, 67 Nev. 273, 288-90, 217 P.2d 355, 363-64 (1950).

The Nevada trial court was a court of original jurisdiction. Nevada Const., Art. 6, § 6; NRS § 3.190. Only Nevada Supreme Court decisions are precedent. Cf Nevada Sup. Ct. Rule 244. Trial court opinions, as distinguished from findings, conclusions, and judgments,

are given no weight by the Nevada Supreme Court. Ormachea v. Ormachea, supra, 67 Nev. at 295, 217 P.2d at 366; Hunter v. Sutton, 45 Nev. 430, 205 Pac. 785 (1922).

The Nevada trial court's ruling is inconsistent with Magill v. Lewis, supra, 74 Nev. 381, 333 P.2d 717, wherein the Nevada Supreme Court refused to apply a "public policy" exception to the contractors licensing statute similar to that seemingly adopted by the trial judge.

Why the Court of Appeals found the trial court decision persuasive whereas it has refused to give such weight to California trial court decisions (Curry v. Fred Olsen Line, 367 F.2d 921, 924, n 10 [9th Cir. 1966]) is unclear. We suggest that the decision of District Judge Foley, the former Nevada Attorney General, is more weighty authority than the interlocutory decision of the state trial judge.

REASONS FOR GRANTING THE WRIT

There are two principal reasons for granting the writ in this case.

First, the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. As set forth supra, pp. 7-11, the decision below appears to have bound Petitioner to the "facts" asserted by MGM in its papers filed in opposition to the motion for summary judgment, thus precluding litigation of the license issue at trial. Such an effect imposes a harsh sanction indeed on the maker of a motion for summary judgment unlike anything mandated by FRCP Rule 56.

Construction of the Federal Rules of Civil Procedure is a well established basis for the exercise of certiorari jurisdiction. See National Hockey League v. Metropolitan Hockey Club, _____, U.S. _____, _____, L.Ed.2d _____ (1976) (No. 75-1558); Schlagenhauf v. Holder, 379 U.S. 104, 13 L.Ed. 2d 152 (1964).

As set forth supra, the decision of

the District Court has been officially reported at 65 F.R.D. 624 and catalogued under appropriate references to Rule 56. Thus, the Court of Appeals' reversal may cause a serious setback to the viability of summary judgment proceedings.

Second, as set forth supra, pp. 11-15, the decision below is in conflict with decisions rendered by the Supreme Court of Nevada.

This case is a diversity case involving the interpretation of Nevada law regulating the licensing of construction and building contractors. The Nevada statutes involved are so similar to the building contractors licensing statutes of three western states in the Ninth Circuit, Arizona, California, and Nevada, and two states in the Tenth Circuit, New Mexico and Utah, that the impact of the decision below in all five states is likely to be immediate and drastic.

The statutes of all five states (Ariz. Rev. Stats. § 32-11-51, Cal. Bus. and Prof. Code § 7028 (West 1975), NRS § 624.230, New Mex. Stats. Annot. § 67-35-15, Utah Stats. Annot. § 58-23-1) require that

persons acting in the capacity of building contractors be licensed. It is a common theme of these state statutes that an unlicensed person who enters into a construction contract cannot bring suit on the contract (Ariz. Rev. Stats. § 32-11-53, Cal. Bus. and Prof. Code § 7031, (West 1975) New Mex. Stats. Annot. § 67-35-33, Eklund v. Elwell, 106 Utah 521, 211 P.2d 849 [1949]).

The decision below, "on public policy grounds," carved out an exception to the usual requirement that a contractor be licensed holding that where an unlicensed person who acts in the capacity of a contractor can demonstrate the "builder competence" and "financial responsibility" which the licensing statute contemplated, he can avoid the penalties ordinarily applicable to unlicensed contractors. This holding is contrary to the holding of virtually every state court which has ruled on this issue and serves to emasculate the contractor licensing laws of the five states involved. Because in diversity cases, the federal courts of each circuit must follow the law of the circuit,

this decision creates inherent conflict between the law which will be applied in federal courts and the law which has heretofor been applied in state courts dealing with similar issues. This result is certain to encourage forum shopping in cases involving construction disputes where multi state parties are involved.

The decision below held that to require both MGM and Taylor, its managing contractor, to be licensed would not further the purpose of the statute because of MGM's financial responsibility and Taylor's presence on the job. (533 F.2d at 489, Appendix A at p. 5-6). (It also held that the Nevada Supreme Court would not follow California and New Mexico precedent).

This reasoning, however, has been almost universally rejected.

In Magill v. Lewis, supra, 74 Nev. 381, 333 P.2d 717, the plaintiff's contract count was dismissed on the pleadings notwithstanding that plaintiff held a valid California contractor's license. The court did not concern itself with

whether public policy had been satisfied by plaintiff's demonstrated competence as a builder in that he had been issued a California license.

In Pickens v. American Mortgage Exchange, 269 Cal.App.2d 299, 74 Cal.Rptr. 788 (1969), plaintiff, who held only a painter's license, performed general contractor's work. The court said:

> "Further, plaintiff's allegation that any work required to be done by a licensed general contractor was done under the supervision of such a contractor will not avoid the effect of the statute." (269 Cal.App. 2d at 302.)

In Eklund v. Elwell, supra, 106 Utah 521, 211 P.2d 849 the court said:

> "Plaintiff contends that Empey as his agent had a license, but, under plaintiff's theory, Empey was not the responsible party, the contractor; and such fact, if true, would not relieve the contractor from the requirements of the statute." (211 P.2d at 850.)

The decision below cited Nevada Equities, Inc. v. Willard Pease Drilling Co., supra (Appendix F, pp. 18-26), and Magill v. Lewis, supra (Appendix F, pp. 1-18), in support of its finding that the statute had been "substantially complied with." However, both cases looked to California precedent as support for their holdings. Also, the Nevada Equities case dealt with the water well drillers licensing statute, not the contractors licensing statute. As the Nevada court there pointed out in support of its decision allowing the unlicensed well driller to maintain the suit, the well driller statute does not expressly bar suits by unlicensed contractors, whereas NRS § 624.320 of the contractors statute does expressly bar such suits:

> "Initially, we note that the bar to the maintenance of an action for compensation (NRS 624.320) precludes contractors who are not licensed under that chapter. The claimant was licensed under that chapter. A comparable provision does not appear in Chapter 534 relating to water well

drillers. The penalty therein provided is fine, imprisonment, or both. NRS § 534.190. When the statute provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is not precluded from maintaining an action to recover on the contract." (Emphasis added.) (440 P.2d at 123, Appendix F at pp. 23-24).

The "substantial compliance" doctrine recognized by the Nevada Supreme Court in Nevada Equities, supra, is from Latipac, Inc. v. Superior Court, supra, 64 Cal.2d 278, 49 Cal.Rptr. 676, 411 P.2d 564. In California, the doctrine is limited to a circumstance under which an unlicensed contractor can show that (1) he held a valid license at the time of contracting (which subsequently lapsed), (2) he promptly renewed his license, and (3) he can demonstrate that a responsible managing employee was in charge of the job throughout. Frank v. Kozlovsky, 13 Cal.App.3d 120, 91 Cal.Rptr. 297 (1970). The doctrine does not apply to a party, such as MGM here, who refused to get a license although requested by

the Nevada State Contractors Board to do so. Since the doctrine was adopted from California, there is no reason to believe that the Nevada Supreme Court would refuse to continue to follow California interpretation thereof.

Furthermore, California law, as distinguished from Nevada and Arizona law, contains a specific exemption from the licensing requirements for an owner who contracts for his project with a general contractor. Nevada and Arizona law have no such exception.

In Miller v. Superior Court, 8 Ariz. App. 420, 466 P.2d 699 (1968) and Brummel v. Whelpley, 46 Mich.App. 93, 207 N.W.2d 399 (1973), owners contended that they should not be required to be licensed because they had in fact contracted for their projects with licensed general contractors.

In both cases these contentions were rejected. And, in Miller v. Superior Court, the court pointed to the difference between the Arizona and California law to support its holding that an Arizona owner was not exempt from the

requirement that he obtain a license even in the situation where he contracted with a licensed general contractor for the construction of the work.

The Nevada statutory scheme specifically exempts certain owner builders (single family residences and agricultural buildings) from the requirement of a license (NRS § 624.330). Thus, it is clear that the legislature intended that other owners be licensed.

Subsequent to the District Court's decision in this case, the Nevada Legislature changed the law (Footnote 8, 533 F.2d at 489, Appendix A at p. 5). (Chapter 623, Statutes of Nevada 1975, amending NRS § 624.330[9]) to exempt from the licensing requirement an owner who contracted solely with a licensed managing contractor.) It was undisputed below that MGM contracted with over 100 contractors, thus MGM could not have been exempt. Also, in Nevada the legislature is presumed to change the law when it amends it. Utter v. Casey, 81 Nev. 268, 401 P.2d 684 (1965).

It is appropriate to review by

certiorari a Court of Appeals' reversal of a summary judgment where there is some clear cut important issue of law fundamental to the further conduct of the case. See, e.g. Ernst & Ernst v. Hochfelder, _____ U.S. _____, 47 L.Ed. 2d 688 (1976).

CONCLUSION

For the reasons stated herein, this Court is respectfully urged to grant this Petition for Writ of Certiorari.

Respectfully submitted,
ROBERT M. SHAFTON
Attorney for Petitioner

TYRE & KAMINS
PETER M. APPLETON
of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MGM GRAND HOTEL, INC., Nevada corporation,
Plaintiff-Appellant,

vs.

IMPERIAL GLASS CO., a co-partnership consisting of GORDON ROSS and I. M. ZERMAN, co-partners; and UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,
Defendants-Appellees.

GORDON ROSS and I. M. ZERMAN, co-partners doing business as IMPERIAL GLASS COMPANY, a co-partnership,
Third-Party Plaintiffs,

vs.

TAYLOR CONSTRUCTION COMPANY, a Nevada corporation; MORRIS M. MASON and STUART J. MASON,
Third-Party Defendants.

No. 75-1274

OPINION

[March 31, 1976]

Appeal from the United States District Court for the District of Nevada

---

Before: KOELSCH and ELY, Circuit Judges, and JAMESON, District Judge.*

ELY, Circuit Judge:

This is a diversity action brought by MGM Grand Hotel, Incorporated (MGM), a Nevada corporation, for breach of con-

*Honorable William J. Jameson, Senior United States District Judge, Billings, Montana, sitting by designation.

tract against Imperial Glass Company (Imperial) a co-partnership consisting of persons who are citizens of California, and Imperial's surety, United Pacific Insurance Company (United), a Washington corporation.

MGM appeals from an order granting summary judgment in favor of Imperial and United. *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 65 F.R.D. 624 (D. Nev. 1974). We reverse.

MGM entered into an agreement with Taylor Construction Company (Taylor), third-party defendant below, by which Taylor agreed to become MGM's "managing contractor" with responsibility for overseeing construction of the MGM Grand Hotel in Las Vegas, Nevada. Because of the massive costs of the project,[1] Taylor was unable to undertake the financial responsibility normally assumed by general contractors. Therefore, the traditional functions of a general contractor were split. Taylor assumed responsibility for supervision of construction,[2] while MGM assumed all financial responsibility for the project.

On June 19, 1972, MGM and Taylor entered into a contract with Imperial by which Imperial was to furnish and install curtainwall for the hotel at a contract price of $2,920,000. On April 20, 1973, MGM filed a complaint against Imperial in the District Court, alleging a failure to render substantial perform-

[1]The estimated cost of constructing the hotel was $100,000,000.

[2]Appellee disputes the level of supervision exercised by MGM; however, in reviewing a summary judgment, we are obliged to view the evidence in the light most favorable to MGM as the non-moving party. *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543 (9th Cir. 1975).

Applying this standard, the record reveals that Taylor was wholly responsible for day-to-day supervision of construction. In addition, Taylor selected the subcontractors with whom it wished to deal, prepared bid specifications, and conducted contract negotiations with prospective subcontractors. It was Taylor that supervised, scheduled, and coordinated all work on the job, and it was Taylor that issued purchase orders for the job, resolved problems that arose on the jobsight, and approved all work and materials provided in the construction of the hotel. MGM's involvement, on the other hand, was limited to the activities of its Chairman of the Board, who performed the duties normally attributed to an owner, plus the operation of a one-man office to disburse money in accordance with MGM's obligation to assume financial responsibility for the project.

ance on the contract. Imperial filed a Motion for Summary Judgment, alleging that MGM was not entitled to bring the action because it was not a "duly licensed contractor" within the terms of Nevada Revised Statutes § 624.320.[3] The statute provides:

> "No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of[4] acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid."

MGM concedes that it is not a licensed contractor; however, it contends that the statute has been satisfied by the undisputed fact that Taylor is a licensed contractor. We agree.

In reviewing an order granting a motion for summary judgment there are two necessary inquiries: "First, is there any genuine issue as to any material fact? Second, if there is no genuine issue of fact, then, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, is the movant entitled to prevail as a matter of law." *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). Although the record indicates to us that there were genuine unresolved issues of material fact, we need not now make that decision. We conclude that Imperial is not, as a matter of law, entitled to prevail.

In reaching that conclusion, we resolve only the issue as to whether, viewing the evidence in a light most favorable to the

[3]In the court below a choice of law issue was raised. The District Court held that Nevada law should be applied, and the appellant does not here challenge that ruling.

[4]Appellees dispute the presence of the word "of" in NRS § 624.320, asserting that it is a clerical error inadvertently substituted for the proper word, "or". Since we conclude that the outcome would be the same in the present context regardless of which word is used, we need not now decide which word was intended by the Nevada Legislature.

non-moving party, MGM is barred by NRS § 624.320 from bringing suit for breach of contract solely because it is not a licensed contractor. The Nevada Supreme Court has never confronted the problem.[5] Indeed, we are aware of only a handful of cases construing any aspect of NRS § 624.320.[6] Thus, we attempt to determine from all available data the manner in which the Nevada Supreme Court would interpret NRS §624.320 if confronted with the precise issue here presented. *See* C. Wright, *Handbook of the Law of Federal Courts* § 58 at 239-40 (2d ed. 1970). *Cf. Yost v. Morrow*, 262 F.2d 826, 828 n.3 (9th Cir. 1959).

Our conclusion that MGM is not barred by NRS § 624.320 from instituting its suit is based upon two independent reasons. First, it would not further the purposes of the statute to require both the "owner" and the "managing contractor" in an arrangment such as that between MGM and Taylor to obtain contractor's licenses. The primary purpose of Nevada's licensing statutes is to protect the public against both faulty construction and financial irresponsibility.[7] In determining whether this purpose would be implemented by barring MGM from bringing suit against Imperial we are aided, to some extent, by the decision of the Nevada Supreme Court in *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968).

In *Nevada Equities* the court declined to bar a contractor under NRS §624.320 from bringing suit to recover compensation for services rendered because there was no ascertainable public policy for doing so. Although the contractor had failed to comply with one of the technical licensing requirements of the State Contractor's Board, the court held that the contractor had "substantially complied" with Nevada's licensing scheme, reasoning that there was no suggestion that the contractor was wanting or lacking "in any particular detrimental to the safety and protection of the public." 84 Nev. at 303, 440 P.2d at 123 (1968). Thus, in order to avoid the harsh result apparently indicated by NRS § 624.320, the Nevada Supreme Court looked to the realities of the contractor's financial status and engineering competence to determine whether the public was adequately protected.

Similarly, the arrangement between MGM and Taylor substantially complied witih the Nevada licensing scheme.[8] To the extent that licensing protects the public against faulty construction, the public was adequately protected by the fact that Taylor, who had total responsibility for supervising construction of the hotel, was a licensed contractor.[9] The issue, then, is whether financial control alone is enough to bar MGM from bringing suit solely because it is not a licensed contractor. Looking to the

[5]Since the District Court's decision in the present case a Nevada trial court has had occasion to examine the same issue. *Las Vegas International Hotel, Inc. v. Argonaut Ins. Co.*, No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975). The court held that NRS § 624.320 was not applicable to managing contractor arrangements, criticising the District Court that entered summary judgment in the present case for ruling to the contrary. *See* note 9 *infra*.

While we are not bound by the Nevada trial court's unpublished opinion (*see King v. Order of Commercial Travelers of America*, 333 U.S. 153 (1948)), we do regard it as persuasive authority in support of the conclusions we reach herein.

[6]*See Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 501 P.2d 639 (1972); *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968); *Briggs v. Zamalloa*, 83 Nev. 400, 432 P.2d 672 (1967); *Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (1958); *Milum v. Herz Bros. Water Well Drilling & Supply Co.*, 74 Nev. 309, 329 P.2d 1068 (1958); *Waite v. Burgess*, 69 Nev. 312, 250 P.2d 919 (1952).

[7]See NRS § 624.260(1), which sets the standards for licenses.

> "The board shall require an applicant to show such a degree of experience, financial responsibility and such general knowledge of the building, safety, health and lien laws of the State of Nevada and the rudimentary principles of the contracting business as the board shall deem necessary for the safety and protection of the public."

See also Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 303, 440 P.2d 122, 123 (1968).

[8]During oral argument, we were told that the Nevada Legislature had very recently amended chapter 624 so as to exempt managing contractor arrangements from the purview of the licensing statutes.

[9]A Nevada trial court of general jurisdiction, in criticizing the District Court's ruling in the present case, suggested that to bar MGM from bringing suit would operate to deprive the public of some of the protection the licensing statutes, NRS ch. 624 were designed to afford.

> "That the statutory scheme of NRS Chapter 624 was designed to protect the public goes without question, but the prohibition laid down in *MGM* can hardly be said to be in the interest of the public. *MGM* sanctions the anomalous situation of relegating an owner to a position where it cannot protect the public from the shoddy workmanship of its subcontractors if it cannot enforce the latter's bond which has been given to secure such a lack of solicitude."

Las Vegas International Hotel, Inc. v. Argonaut Ins. Co., No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975).

realities of MGM's financial status, there is absolutely no suggestion in the record that MGM is financially irresponsible.[10] Indeed, it was to exploit the strong financial position of MGM's parent corporation that the managing contractor arrangement was adopted by MGM. Moreover, because MGM is operating hand in hand with a licensed contractor, the Nevada Contractors' Board is in a position to monitor the progress of construction should there arise any doubt about the financial stability of the project. Thus, a policy of protecting the public would in no way be furthered by imposing upon MGM such a harsh penalty as barring it from bringing its suit.

Our second reason for holding that MGM is not barred by NRS § 624.320 is that the statute, by its terms, only applies to suits "for the collection of compensation for the performance of any act or contract." Hence, the present action cannot be barred because MGM seeks damages for failure of performance rather than compensation for services rendered.

Although we are aware that some other states have construed similar statutes to bar damage actions for breach of contract,[11] the Nevada Supreme Court has never decided the issue, and we are unwilling to assume that it would adopt a position so obviously contrary to the explicit, literal language of the statute.[12]

NRS § 624.320 works a forfeiture, a drastic penalty, and the Nevada Supreme Court has unequivocally remarked that it will

---

[10]MGM established a trust fund of $50,000,000 to finance construction of the hotel. This amount is far in excess of the $20,000 surety bond that may be required by the State Contractors' Board as a prerequsite to obtaining a contractor's license. *See* NRS § 624.270(4).

[11]*See, e.g., General Ins. Co. of America v. St. Paul Fire and Marine Ins. Co.*, 38 Cal. App. 3d 762, 113 Cal. Rptr. 613 (1974); *Proffitt & Durnell Plumbing, Inc. v. David H. Beer Co.*, 247 Cal. App. 2d 518, 55 Cal. Rptr. 764 (1966); *Fleming v. Phelps-Dodge Corp.*, 83 N.M. 715, 496 P.2d 1111 (1972).

[12]*See Las Vegas International Hotel, Inc. v. Argonaut Ins. Co.*, No. A 93354 (8th Jud. Dist. Ct. Nev., May 28, 1975). *Cf. Milum v. Herz Bros. Water Well Drilling & Supply Co.*, 74 Nev. 309, 312, 329 P.2d 1068, 1069 (1958) (rejecting the theory that an unlicensed contractor was barred by NRS § 624.320 from defending an action because "(s)uch construction would do violence to the plain meaning of the act."), cited with approval in *Walker Bank & Trust Co. v. Smith*, 88 Nev. 502, 501 P.2d 639 (1972).

not condone such a forfeiture in the absence of some sound public policy requiring that it should do so. *Nevada Equities, supra*, 84 Nev. at 303, 440 P.2d at 123. To uphold the forfeiture applied against MGM would necessitate our construing the statute more broadly than its language fairly permits. We decline to do this, especially since we can see no overriding public policy compelling us to do so. Thus, even if we were to find that MGM is a "contractor" within the meaning of NRS § 624.320, we would not hold that the statute prohibited MGM's institution of the suit.

REVERSED AND REMANDED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 4-6-76—400

APPENDIX

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MGM GRAND HOTEL, INC., a Nevada corporation, Plaintiff-Appellant, vs. IMPERIAL GLASS CO., a co-partnership consisting of GORDON ROSS and I. M. ZEMAN, co-partners; and UNITED PACIFIC INSURANCE COMPANY, a Washington corporation, Defendants-Appellees.	FILED May 21 1976 ORDER No. 75-1274
GORDON ROSS and I. M. ZEMAN, co-partners doing business as IMPERIAL GLASS COMPANY, a co-partnership, Third-Party Plaintiffs, vs. TAYLOR CONSTRUCTION COMPANY, a Nevada corporation; MORRIS M. MASON and STUART J. MASON, Third-Party Defendants.	

Before: KOELSCH and ELY, Circuit Judges, and JAMESON, District Judge.*

All three judges initially concerned with the subject case (Koelsch, Ely, and Jameson) have voted to deny the Petition for Rehearing. Judges Koelsch and Ely have noted that the suggestion for en banc rehearing be rejected, and Judge Jameson has recommended that such suggestion be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

*Honorable William J. Jameson, Senior United States District Judge, Billings, Montana, sitting by designation.

APPENDIX

APPENDIX C

MGM GRAND HOTEL, INC., a Nevada Corporation, Plaintiff,

v.

IMPERIAL GLASS CO., a co-partnership consisting of Gordon Ross and I. M. Zerman, co-partners, and United Pacific Insurance Company, a Washington Corporation, Defendants.

Civ. No. LV-2032 RDF.

United States District Court,
D. Nevada.
Dec. 17, 1974.

Hotel owner brought action against subcontractor and its surety to recover for costs of completing the work after subcontractor had been taken off the job for allegedly shoddy workmanship. On contractor's and surety's motion for summary judgment, the District Court, Roger D. Foley, Chief Judge, held that determination of whether owner had acted as a contractor and, if so, was required to have a contractor's license in order to bring the

action would be made under Nevada law even though contract specified that rights and liabilities of the parties were to be determined under California law, where application of California law would circumvent fundamental policies of Nevada law and where Nevada was the state whose law would have applied in the absence of the contractual provisions; that hotel owner did act as a contractor; that hotel owner was required to obtain Nevada contractor's license; and that failure of the owner to obtain the contractor's license precluded it from bringing the aftion.

Summary judgment granted.

Wiener, Goldwater & Galatz, Las Vegas, Nev., for plaintiff.

Tyre & Kamins, Peter M. Appleton, Los Angeles, Cal., Rogers, Monsey, Lea, Woodbury & Sheehan, Las Vegas, Nev., for defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ROGER D. FOLEY, Chief Judge.

FACTS

Plaintiff initiated the instant suit on April 20, 1973. As a jurisdictional base plaintiff relies on diversity of citizenship in that it is a Nevada corporation, defendant Imperial Glass Company is a California corporation, and defendant United Pacific Insurance Company is a Washington corporation. Since all defendants were transacting business within the State of Nevada, in personam jurisdiction over them was obtained through the use of NRS § 14.065. (The Nevada "long-arm" statute.) Plaintiff has alleged damages in excess of $10,000.

Plaintiffs alleged cause of action against defendants arose in the following fashion. On June 19, 1972, plaintiff and

defendant Imperial Glass Company (hereinafter Imperial) entered into a contract whereby Imperial was to act as a subcontractor and perform certain services in conjunction with the construction of plaintiff's hotel and casino facility in Las Vegas, Nevada. According to the terms of this agreement, Imperial was to furnish to plaintiff an acceptable surety bond to insure the performance of Imperial's contractual duties. Imperial procured this surety bond from defendant United Pacific Insurance Company (hereinafter United Pacific) and furnished it to plaintiff. On April 16, 1973, after Imperial had performed a substantial amount of work on the project, plaintiff terminated the aforementioned contract alleging that Imperial had performed its work in a shoddy manner and had failed to comply with the applic-

able construction completion schedule.

Plaintiff further alleged that as a result of this breach it was forced to hire another sub-contractor to finish the remainder of Imperial's work at a cost in excess of $10,000. Plaintiff's allegation directed towards defendant United Pacific is that it failed to reimburse plaintiff for the damage caused by Imperial's breach or correct the construction defects caused by the breach.

On June 18, 1973, defendants filed their answer to plaintiff's complaint, specifically denying the majority of plaintiff's allegations and setting forth certain affirmative defenses. In addition, defendants Gordon Ross and I. M. Zeman, copartners, dba Imperial Glass Company, filed a counter-claim against plaintiff and a third-party complaint against third-party

defendants Taylor Construction Company (hereinafter referred to as Taylor), Morris M. Mason, and Stuart J. Mason. In their counter-claim defendants allege that they have suffered damages in excess of $22,000,000.00.

On May 14, 1974, defendants and third-party plaintiffs filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure praying that MGM's complaint be dismissed. This motion for summary judgment was based on the ground that,

> ". . . Plaintiff cannot maintain this action because of Plaintiff's failure and inability to allege and prove that it was a duly licensed contractor under the laws of the State of Nevada during all times when it was acting in the capacity of a contractor within the State

> of Nevada, in connection with its performance of the contract on which Plaintiff's complaint is based." Defendant's motion for summary judgment p. 2.

After the receipt of all appropriate responsive and reply memorandums of points and authorities the motion for summary judgment was set for oral argument on November 7, 1974. Having heard oral argument on the issue, and no cross motion for summary judgment having been filed by plaintiff, by order of this Court dated November 7, 1974, defendants and third-party plaintiffs' motion for summary judgment stand submitted.

ISSUE

Should the motion for summary judgment be granted?

DISCUSSION

[1] (I) IS THERE A GENUINE ISSUE OF MATERIAL FACT PRESENTED BY THE INSTANT CASE? The procedure involved in granting a motion for summary judgment allows the cause to be removed from the trier of fact and decided by the court as a matter of law if there are no genuine issues of material fact presented by the case. Rule 56 of the Federal Rules of Civil Procedure,

". . . permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, answers to interrogatories, and admissions on file show that there are no genuine issues of material fact to be tried." 6 Moore's Federal Practice ¶ 56.04[1], p. 2058.

The motion for summary judgment may rest entirely on the pleadings, or it may be supported by affidavits. Once the movant has made and supported his motion in this fashion a duty devolves on the opposing party to affirmatively show that there are genuine issues of material fact to be tried in the case. As the Ninth Circuit has noted:

"When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of his pleading. As stated in Rule 56(e), his response by affidavits or otherwise must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if otherwise appropriate, shall be entered against him. (Citations omitted.)

> One against whom a motion for summary judgment is filed is therefore under a duty to show that he can produce evidence at the trial, and is not entitled to a denial of that motion upon the unsubstantiated hope that he can produce such evidence at the trial." Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 (9th Cir. 1969).

If affidavits are filed either in support of or opposition to the motion for summary judgment, these affidavits,

> ". . . must be made on the personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that affiant is competent to testify to the matters stated therein." See 6 Moore's Federal Practice ¶ 56.22[1], p. 2803, and Rule 56(e) F.R.C.P.

In addition to memoranda of points and authorities, both parties to the instant case have filed affidavits. Upon examination it appears that these affidavtis meet the aforementioned test.

[2] The instant case presents this Court with two key issues. The first of these is clearly an issue of law, hence, it presents no difficulty in the context of a motion for summary judgment. The first issue arises out of Section 16.12 of the agreement entered into between plaintiff MGM and defendant Imperial. This section provides that, "[T]his Agreement shall be governed by the laws of the State of California applicable to contracts made or performed therein." The issue presented by this section is then one of choice of law, and as such clearly an issue of law, thus, the fact that the parties differ as

to its applicability to the case at bar has no bearing on defendants' motion for summary judgment. This issue will be discussed in greater detail, infra.

The second key issue in the instant case is no less controverted by the opposing parties than the first issue. This second key issue can more properly be classified as a number of sub-issues that revolve around a determination of plaintiff MGM's status under the Nevada contractor licensing statutes. The parties are in complete disagreement as to whether the second key issue in the case is more properly classifiable as an issue of fact or an issue of law. By its very nature, if it qualifies as an issue of fact it is clearly a genuine issue of material fact, thus, summary judgment would be improper. If, however, it is more properly classified as an issue

of law, the instant case is ripe for summary judgment.

The main thrust of defendants' motion for summary judgment is based upon the provisions of NRS § 624.320. This section provides that:

> "No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed con-

tractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.320.

Defendants allege that at the time plaintiff caused the MGM Grand Hotel to be built in Las Vegas, Nevada, plaintiff was: (1) acting as a contractor, (2) not exempt from the provisions of the Nevada contractor licensing statutes, and (3) required to be licensed as a contractor under the provisions of those statutes. If defendants' allegations are accepted by the Court, they next allege that the provisions of NRS § 624.320, quoted above, foreclose plaintiff from suing upon the alleged breach of contract arising from the construction of the hotel. Plaintiff, of course, controverts each of defendants' allegations, and, in addition, alleges that the issue of its status under the Nevada contractor statutes

is a genuine issue of material fact. This does not appear to be the case.

Initially it must be noted that the question of plaintiff's possession, at any time, of a valid Nevada contractor's license is not at issue in the instant case. Defendants have alleged, and plaintiff has admitted, that, at no time relevant to this action, plaintiff possessed a valid Nevada contractor's license. Plaintiff's explanation of this fact is its allegation that it was not required, under Nevada law, to possess such a license.

The statutes regulating and classifying building contractors in Nevada are set forth in Chapter 624 of the Nevada Revised Statutes. In defining the term "contractor" NRS § 624.020(2) notes that:

"Within the meaning of this chapter, a contractor is any person, except a li-

censed architect or a registered professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction

project shall be accepted by the board or any court of this state as prima facie evidence that the person securing such permit or employing any person on a construction project is acting in the capacity of a contractor under this chapter." NRS § 624.020(2).

The chapter goes on to note that:

"'Person' as used in this chapter includes an individual, a firm, a copartnership, a corporation, an association or other organization, or any combination of any thereof." NRS § 624.030.

Although the section defining "contractors" appears to be all inclusive, certain persons are exempted from the operation of the chapter, to wit:

"Owners of property building or improving residential structures thereon for the occupancy of such owner and not in-

tended for sale. . . . Owners of property, the primary use of which is as an agricultural or farming enterprise, building or improving structures thereon for the use or occupancy of the owner and not intended for sale or lease."

NRS § 624.330(4), (8).

In further defining the term "contractor" the State Contractors Board has issued regulations classifying types of contractors. For example, under the heading Primary Classification E--Owners--the regulations provide that,

"An Owner's License is designed for persons not regularly engaged in the construction business who need a contractor's license for the purpose of building or improving their own property (other than single family residences occupied by the owner and not intended for

sale). An Owner's License will be issued for a specific property or properties in those classifications for which the owner is deemed qualified."

See Rules and Regulations of the State of Nevada State Contractors Board, Article III, p. 12 (revised July 1973).

If a "person", as defined in NRS § 624.030, acts in the capacity of a contractor, without possessing the required license, or being exempt therefrom, such action is deemed unlawful. See NRS § 624.230. Under the statutes two possible consequences can flow from such unlawful action. Each of the potential consequences is punitive in nature. The first consequence is that,

"No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, en-

gaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.320.

The second consequence provides that,

"Any person violating any of the provisions of this chapter shall be punished by a fine of not more than $500." NRS § 624.360.

[3] The activities, duties, and respon-

sibilities of each party in the instant case pertaining to the construction of plaintiff's hotel are set forth in certain contracts. Neither side of the dispute has alleged that the other has acted in derogation of the contractual provisions. The parties agree that the relationships structured by the contractual provisions existed as defined by the terms of the agreements. Any attempt to show otherwise would, of course, be barred by the operation of the Parol Evidence Rule. The parties' disagreement centers around the effect of the contractual provisions under Nevada law; i.e., the parties agree that plaintiff acted in the capacity of owner as provided for by the contracts; the conflict arises over whether or not plaintiff was required to have a Nevada contractor's license to act in that

fashion. Thus framed, it is clear that the issues of whether plaintiff acted in the capacity of a contractor, or was required to obtain a Nevada contractor's license, or was exempt from such requirement, are issues of law to be resolved by applying the pertinent Nevada Statutes to the facts presented. The facts surrounding plaintiff's activities in constructing its hotel are not disputed, only the legal effect of these activities under Nevada law. This being the case, this Court finds that the instant case presents no genuine issue of material fact, thus it is ripe for summary judgment.

(II) THE CHOICE OF LAW ISSUE:

As noted supra, Section 16.12 of the contract entered into between plaintiff MGM and defendant Imperial provides that the agreement shall be governed by California

law. What the Court is presented with then is the situation where the parties, a Nevada corporation and a California co-partnership, have chosen California law to govern a contract to be performed entirely within the State of Nevada. The file in the instant case is silent as to where this particular contract was entered into.

[4,5] As a general rule the parties to a given contract are always free to choose the law that will govern their contractual rights and duties. However, since this is a general rule it is subject to exceptions. The Restatement of the Law 2d notes that:

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by

an explicit provision in their agreement directed to that issue, unless either . . .

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement of the Law 2d, Conflict of Laws 2d, § 187(2), (2)(b) (1971).

That which is the "fundamental policy" of a state is not, of course, susceptible to easy definition, rather it must be determined on a case by case basis by examining the law of the state in question. However,

before that question is reached the provisions of § 188 must be applied to determine if Nevada would be the state of the applicable law in the absence of an effective choice of law by the parties. Section six of the Restatement provides general choice of law principles. This section provides in pertinent part that:

". . . the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied."

Restatement of the Law 2d, id. § 6(2).

Section 188 further provides that:

"In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties. . . ."

Restatement of the Law 2d, id. § 188(2).

As noted supra, the place of contracting is unknown in the instant case, as is the place of negotiation. However, the place of performance, the location of the subject matter, and the place of incorporation and place of business of one of the parties is found in Nevada. It seems clear then that Nevada has a substantial number of contacts with the contract involved in the instant case. On the other hand, the only California contact that clearly appears is that it is the domicile of one of the parties to the contract. It seems clear then that if the parties in the instant case have not made an effective choice of law, then under the principles

of §§ 6 and 188 of the Restatement, Nevada law should be applied to test their rights and liabilities under the contract.

The final analysis of the parties' choice of law depends on § 187. If the parties have made an effective choice then California law must be applied. However, if California law is contrary to a fundamental policy of the law of Nevada, when it appears that Nevada has a materially greater interest in the contract in question than California, then Nevada law must be applied. Thus, an examination of the laws of the two states is necessary. It is clear from this examination that the laws are contrary. Chapter nine of the California Business and Professions Code is similar in scope and effect to Chapter 624 of the Nevada Revised Statutes. Both chapters provide for the regulation and

licensing of contractors. The major difference in the California Code that specifically pertains to the case at bar is found in § 7044. This section provides that:

> "This chapter does not apply to an owner of property building or improving structures thereon, or appurtenances thereto, who contracts for such a project with a contractor or contractors licensed pursuant to this chapter."

Cal.Bus. and Prof.Code § 7044 (1973). It is undisputed in the instant case that Taylor Construction Company, who acted as managing contractor for plaintiff in the construction of plaintiff's hotel, was at all pertinent times a licensed contractor so, arguably, if California law were applied to the instant contract plaintiff would be exempt from the contractor li-

censing requirements. As noted supra, such is not the case under Nevada law. Even though an owner contracts with a licensed contractor he is also required to be licensed as a contractor unless exempt from the provisions of Chapter 624. The question still remains as to whether or not this statutory difference represents a fundamental policy of Nevada law.

[6] Since jurisdiction in the instant case is based on diversity of citizenship, this Court is, in effect, sitting as a Nevada court and in doing so it must apply the law as it believes its Nevada counterpart would. It is clear from an examination of NRS Chapter 624 that its provisions delineating the consequences that result when an unlicensed, non-exempt person acts as a contractor are designed to be punitive in nature. The de-

terrent effect of not allowing such an unlicensed person to sue on his contract entered into in derogation of the statute is obvious. It is equally obvious that in passing these statutes the Nevada Legislature desired to protect the public at large, including specialized segments of the public such as materialmen and subcontractors, from the pitfalls that might be encountered in dealing with unlicensed contractors. Even though it can be inferred that one of the prime motives behind the licensing statutes was to insure that those who act in the capacity of contractors be financially stable, and there is no allegation in the instant case that plaintiff was not, the statutory command is clear. If one acts in the capacity of a contractor without a license he is subject to the penalties provided for

by the chapter. It is clear then that the punitive provisions of Chapter 624 express a strong public policy of the State of Nevada. This legislative desire to punish those who ignore the statutory command can even be termed a fundamental policy. To allow parties who enter into a contract to evade these statutory provisions by providing that the laws of a state with a lesser degree of interest shall control their contractual relations is clearly in opposition to this fundamental policy, particularily when the subject matter and performance of the contract are to remain entirely within this state. While sitting, in effect, as a Nevada court, this Court cannot allow the fundamental policy behind the Nevada statutes to be circumvented in this fashion. Even though the parties in the instant case have specified

that California law is to govern their contractual relations, this Court finds that to do so, in the area of the contractor licensing provisions, would be to circumvent a fundamental policy of Nevada, hence Nevada law must be applied to determine if the plaintiff was required to secure a contractor's license and, if so, the effect of its failure to do so.

(III) THE APPLICATION OF NEVADA LAW TO THE FACTS OF THE INSTANT CASE: As noted supra, plaintiff has admitted that at no time relevant to the case at bar did it possess a valid Nevada contractor's license. Therefore, in applying Nevada law to the case at bar, four questions must be answered: (1) was plaintiff acting as a contractor, (2) was plaintiff required to possess a valid Nevada contractor's license in order to construct its

hotel, (3) was plaintiff exempt from the provisions of the licensing statutes, and (4) if plaintiff was required to possess such a license, what is the effect of its failure to do so?

In order to determine if plaintiff was acting as a contractor within the scope of NRS Chapter 624 it is necessary to examine certain of the contractual agreements plaintiff entered into in order to facilitate the construction of its $100,000,000. hotel and casino complex. Normally, when an owner desires to construct a facility such as plaintiff's hotel he will hire a general contractor who will in turn contract with various subcontractors. The general contractor normally takes all financial responsibility for the entire project. Even though the owner is the one ultimately paying all

costs, the general contractor is the one looked to by the materialmen, suppliers, sub-contractors, etc., for payment. Plaintiff in the instant case elected not to follow this established procedure in the construction of its hotel. Instead, plaintiff chose to utilize what is commonly referred to as the managing contractor concept. Pursuant to this plan plaintiff hired cross-defendant Taylor Construction Company to be the managing contractor of the project. A copy of the agreement between plaintiff and Taylor has been made a part of the record in the instant case, as has a copy of the agreement between plaintiff and defendant Imperial.

An examination of the MGM/Taylor contract discloses the following information: (1) Taylor was employed by plaintiff,

". . . in a consulting and supervisory capacity to supervise and administer the construction of the project." See MGM/ Taylor contract, p. 1. (2) Taylor was to be paid a flat fee for these services. Id. § 2.01. (3) All sub-contracts, etc., were to be made on plaintiff's behalf and plaintiff, but not Taylor, would be responsible for payment thereof. Id. § 2.03. (4) The agreement created no contractual obligations between Taylor and the various sub-contractors unless Taylor specifically assumed the obligation in writing. Id. § 15.02.

Likewise, an examination of the MGM/ Imperial contract sheds some light on plaintiff's role in the construction of its hotel. The following information is disclosed: (1) Even though Taylor's name appears on the contract it is clear that

Taylor entered into the contract for the benefit of plaintiff. See MGM/Imperial contract p. 1. See also p. 32 where the contract was signed by Taylor as plaintiff's representative, and also by plaintiff's chairman of the board. (2) Plaintiff agreed to pay Imperial for its services on the project. Id. § 1.02. (3) Even though Taylor had the authority to supervise Imperial's work, plaintiff maintained the ultimate control. Id §§ 5.04, 5.08, 8.01, 10.01, 10.02, 13.01.4. (4) The agreement created no contractual relationship between Taylor and Imperial. In addition, plaintiff, and not Taylor, was financially liable to Imperial. Id. § 16.02.

[7] The aforementioned contracts clearly indicate that plaintiff maintained the ultimate financial responsibility and con-

trol over the project. Additional evidence supports this conclusion. The deposition of plaintiff's chairman of the board, Mr. Fred Benninger, indicates that he participated in the negotiation, and made the final approval of the contracts entered into with the various sub-contractors on the project. See defendants' exhibit 1, pp. 16-17, attached to their motion for summary judgment. It is clear from the facts presented that plaintiff fits the description of a "contractor" as provided for by NRS § 624.020(2) noted supra, since it appears that plaintiff undertook through others (i.e., Taylor) to construct its hotel. In addition the file in the instant case contains prima facie evidence that plaintiff was acting as a contractor. In pertinent part NRS § 624.020(2) provides that:

> "Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project shall be accepted by the board or any court of this state as prima facie evidence that the person securing such permit or employing any person on a construction project is acting in the capacity of a contractor under this chapter." NRS § 624.020(2).

In addition to the fact that plaintiff employed Taylor and various sub-contractors on the construction project, defendants' exhibit 3 attached to their motion for summary judgment reveals that plaintiff's chairman of the board signed an application for a Clark County, Nevada, building permit for one phase of the construction of plaintiff's hotel. In addition, § 9.03 of the MGM/Imperial contract provided that

plaintiff was to secure the general building permit for the project. Thus, the answer to the Court's first question is clear. Under Nevada law plaintiff was acting as a contractor in the construction of its hotel.

The Court's second and third questions can be answered together. Respectively these questions ask if plaintiff was required to secure a Nevada contractor's license, or was exempt from the statutory provisions. Before examining the statutory provisions of NRS Chapter 624 it is necessary to discuss plaintiff's allegation that the Nevada State Contractors Board has made a determination that plaintiff is not required to possess a contractor's license. The board's initial involvement into this situation appears to have occurred in October of 1972, at which

time the board notified plaintiff that it would be necessary for it to procure a contractor's license in order to continue with the construction of its hotel. See defendants' exhibit 3 attached to their reply points and authorities in support of the motion for summary judgment. It appears that plaintiff ignored this notice from the board and proceeded to continue with the construction of its hotel. On April 25, 1974, long after the hotel had been completed, the question of plaintiff's license again came before the board. The April 25, 1974, hearing was conducted by the board to determine if Taylor Construction Company should be disciplined for certain alleged violations of NRS Chapter 624. One of the alleged violations pertained to the aiding and abetting of unlicensed contractors, spe-

cifically plaintiff. Defendants in the instant case were not represented at this hearing. During the course of the hearing the managing contractor concept was discussed in an attempt to determine whether plaintiff or Taylor was acting as the general contractor on the project. While the question of whether or not plaintiff was required to have a contractor's license was never directly discussed at the hearing, one of the board members made the comment that he thought that Taylor was the general contractor on the project. See defendants' exhibit 2 attached to their reply points and authorities in support of the motion for summary judgment. When the board's ruling concerning Taylor's possible violations of NRS Chapter 624 was handed down no mention was made of plaintiff's status with respect to a contrac-

tor's license. See defendants' exhibit 6 attached to their reply points and authorities. Since it does not appear from the board's findings that Taylor was penalized for aiding and abetting an unlicensed contractor (i.e., plaintiff) it can be inferred that the board felt that plaintiff was not required to possess such a license. However, the record is far from clear on this point.

[8] Even if it can be inferred that the Nevada State Contractors Board has made a finding that plaintiff was not required to possess a contractor's license in order to construct its hotel, this Court is not bound by that determination for several reasons. First of all, while NRS § 624.110 gives the board the authority to make rules and regulations necessary to carry out the provisions of Chapter 624, there

has been no showing that the board has complied with the provisions of that section or the mandate of NRS Chapter 233B, The Nevada Administrative Procedure Act, relating to the adoption of administrative regulations, by passing a regulation exempting those in plaintiff's position from the licensing requirements of NRS Chapter 624. In addition, even if the board had made such a regulation, it would appear that in doing so they would be acting in derogation of the statutory command of NRS Chapter 624. The language of NRS Chapter 624 is clear and unambiguous. The chapter contains no exception for one in plaintiff's position.

"Administrative construction will not be permitted to override the plain language of the law, and where a statute is not ambiguous and its construction

is not doubtful, the rule that courts will give weight to an administrative construction in determining the true meaning of a statute is not applicable." See 2 Am Jur 2d, Administrative Law § 248 p. 77 and cases cited therein.

The record is unclear, at best, as to whether or not the Nevada State Contractors Board has attempted formal recognition of the managing contractor concept by providing that an owner who contracts with a licensed contractor (although not one in the position of a general contractro) is exempt from the licensing provisions of NRS Chapter 624. However, if the board has attempted such a recognition it would appear that they are acting in excess of their statutory authority. To provide such an exemption by recognizing the managing contractor concept calls for

legislative rather than administrative action. Since the Nevada Legislature has not chosen to take this step, the existing statutes must be examined to determine if plaintiff falls within their scope.

[9] This Court has already determined that due to its activities in connection with the construction of its hotel, plaintiff was acting as a contractor. Since it was acting as a contractor, under the Nevada statutes plaintiff was required to possess a Nevada contractor's license (specifically a primary classification "E" license. See Rules and Regulations of the State of Nevada State Contractors Board, Article III p. 12 [revised July 1973], noted supra,) in order to construct its hotel unless exempted from this requirement by the provisions of NRS § 624.330. Since plaintiff was not an owner

building on residential, agricultural or farming property, the only possible exemption provisions that could apply to it, the Court's answer to the second and third questions is clear. Since plaintiff was not exempt from the provisions of NRS Chapter 624, it was required to possess a valid Nevada contractor's license.

[10] The fourth and final question that must be answered by the Court is the effect of plaintiff's failure to obtain the required contractor's license on its ability to sue the defendants for breach of contract. By acting as a contractor without possessing the required license, plaintiff has committed an unlawful act. See NRS § 624.230. Further, the unlawful nature of plaintiff's acts has tainted its contract with defendants to the extent that the contract must be considered il-

legal. In addition, NRS § 624.320 provides that:

> "No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor at all times during the performance of such act or contract and when the job was bid."

NRS § 624.320.

There does not appear to be any Nevada case that directly considers the issue presented to this Court, however, there are a number of cases from Nevada and other jurisdictions that consider closely related issues and can provide this Court with guidance. Although the language of NRS § 624.320 does not specifically forbid one in plaintiff's position from suing for breach of contract, it is clear from an examination of defendants' authorities that such a result would not strain the intent of the statute. As the Nevada Supreme Court has noted:

> "Norwood v. Judd may now be considered the leading case on the subject. Decided in 1949, it has been followed or cited with approval in numerous cases from 1954 to 1958. Among these we may note particularly Grant v. Weatherholt,

123 Cal.App.2d 34, 266 P.2d 185, Wilson v. Stearns, 123 Cal.App.2d 472, 267 P.2d 59, and Kennard v. Rosenberg, 127 Cal.App.2d 340, 273 P.2d 839, as being in point here. In Grant v. Weatherholt [123 Cal.App.2d 34, 266 P.2d 191] the court fully recognized the nullifying effect of the statute. 'Plaintiff's contract with the corporation was void. He could not recover on the contract, nor for breach of it, nor for the value of work done or for moneys expended thereunder.'" Magill v. Lewis, 74 Nev. 381, 333 P.2d 717, 719-720 (Nev. 1958).

This conclusion is also supported by an examination of additional Nevada cases that have considered the effect of this and similar punitive type statutes. See Milum v. Herz Brothers Water Well Drilling and Supply Company, 74 Nev. 301, 329 P.2d

1068 (1958); Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968); Robken v. May, 84 Nev. 433, 442 P.2d 913 (1968); and Beggs v. Lowe, 516 P.2d 467 (Nev.1973).

Case law from other jurisdictions also supports the proposition that an unlicensed contractor (who is required to be licensed by the statutory provisions) is barred from suing for compensation for, or breach of, a contract arising out of his unlawful activities. For example, before California amended its statutory provisions to provide that an owner who contracted with a licensed contractor was exempt from the licensing provisions (see Cal.Bus. and Prof.Code § 7044) several California cases reached this result. See Proffitt & Durnell Plumbing, Inc. v. David H. Baer Co. 247 Cal.App.2d 518, 55

Rptr. 764 (1966); Currie v. Stolowitz, 169 Cal.App.2d 810, 338 P.2d 208 (1959); Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 308 P.2d 713 (1957); Pickens v. American Mortgage Exchange, 269 Cal.App. 2d 299, 74 Cal.Rptr. 788 (1969); and Moon v. Goldstein, 69 Cal.App.2d 800, 158 P.2d 1004 (1945). See also Miller v. Superior Court in and for County of Pima, 8 Ariz. App. 420, 446 P.2d 699 (1968); Northen v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1951); Brummel v. Whelpley, 46 Mich.App. 93, 207 N.W.2d 399 (1973); Fleming v. Phelps-Dodge Corporation, 83 N.M. 715, 496 P.2d 1111 (1972); and Eklund v. Elwell, 116 Utah 521, 211 P.2d 849 (1949).

An examination of the aforementioned cases and statutes clearly dictates the result in the instant case. For this Court to hold that the provisions of NRS

§ 624.320 bar plaintiff's suit against defendants clearly does not result in a strained application of the statutory provisions, indeed, a strained application would result if the Court were to hold otherwise. Having found that the instant case presents no genuine issue of material fact for resolution and that the defendants are entitled to prevail as a matter of law, the defendants' motion for summary judgment is hereby granted. This order constitutes this Court's findings of fact and conclusions of law. Accordingly, let summary judgment be entered dismissing plaintiff's complaint. The issues raised by the counterclaim and third-party complaint remain to be tried.

APPENDIX

APPENDIX D

Federal Rules of Civil Procedure, Rule 56, Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for

all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and

opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not

so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable ex-

penses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Nevada Revised Statutes, Section 624.320

No person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this act without alleging and proving that such person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, was a duly licensed

contractor at all times during the performance of such act or contract and when the job was bid. (Emphasis in original.)

APPENDIX

APPENDIX E

California Business and Professions Code

Sec. 7031. Actions by contractor, alleging and proving license. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract, except that such prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

New Mexico Statutes, Annotated

Sec. 67-35-33. Suit by contractor for compensation--Pleading and proof of license.--A. No contractor shall act as agent or bring or maintain any action in any court of the state for the collection of compensation for the performance of any act for which a license is required by the Construction Industries Licensing Act [67-35-1 to 67-35-63] without alleging and proving that such contractor was a duly licensed contractor at the time the alleged cause of action arose.

B. Any contractor operating without a license as required by the Construction Industries Licensing Act shall have no right to file or claim any mechanic's lien as now provided by law.

APPENDIX

APPENDIX F

W. Lynn MAGILL and Paul H. Wright,
Appellants,

v.

Joby LEWIS and Helen Lewis, his wife,
Respondents.

No. 4070.

Supreme Court of Nevada.
Dec. 22, 1958.
Rehearing Denied Jan 13, 1959.

Action to recover balance owing under building contract and damages for alleged fraud. The second Judicial District Court, Washoe County, Dept. No. 3, Gordon W. Rice, J., entered summary judgment for defendants, and plaintiffs appealed. The Supreme Court, Badt, C. J., held that fact that one of two plaintiffs was not licensed as a contractor in Nevada would not preclude recovery for unjust enrichment of defendants as a result of their refusal to pay balance owing under contract.

Judgment reversed and cause remanded for new trial.

Sidney W. Robinson, Reno, for appellants.

Vargas, Dillon & Bartlett, Reno, for respondents.

BADT, Chief Justice.

Appellant Magill, a licensed contractor in the State of Nevada, and appellant Wright, a licensed contractor in the State of California, entered into a contract with respondents for the construction of a casino, bar and restaurant building at Lake Tahoe in the Sierra Nevada mountains, within the State of Nevada, but fairly close to the California line, for the sum of approximately $130,000. The first cause of action in the complaint in the court below was for the balance of some $12,000 due on the contract. The second cause of action is based on fraud. It alleges that re-

spondent Lewis, prior to March 29, 1955, desired the construction of the building so as to be ready for occupancy for the summer season of 1955 at the Lake, and on said date conferred with both plaintiffs and insistently requested such construction; that plaintiffs advised Lewis that Wright was not a licensed contractor under the laws of Nevada but was licensed in California and that Wright was prohibited by Nevada statutes from engaging in the contracting business in Nevada and that he could therefore not undertake the contract; that Lewis thereupon falsely and fraudulently and with intention to deceive and defraud the plaintiffs represented that Wright's failure to possess a Nevada contractor's license was immaterial to him as he was relying upon Wright's experience, skill, ability and qualifications rather

than upon the guarantee thereof implied from the holding of a Nevada license; that he, Lewis, would not employ the lack of such license adversely to the plaintiffs; that he was satisfied so long as Magill had a Nevada license and that he would consider Magill's license as inuring to the benefit of the partnership or joint adventure; that said representations were false and known to Lewis to be false and that Lewis intended to use Wright's lack of a Nevada license as an excuse for refusing to pay in full on the contract; that plaintiffs, believing and relying on these representations, were induced to enter into the agreement to furnish the labor and materials for the structure for the sum of $130,000, to the end that Lewis was enabled to open for business June 17, 1955, and the building completed August 25, 1955;

that Lewis failed to pay the balance due in the sum of $12,735; that plaintiffs in due course filed their lien and their suit to foreclose the same and that defendants answered, setting up Wright's lack of a Nevada license and moved for summary judgment; that such plea of the statute, if successful, would result in damage to plaintiffs in the sum of $12,735 by reason of the false and fraudulent representations alleged, all of which were set forth in an amended and supplemental complaint.

NRS § 624.230 provides that it shall be unlawful for any person, association etc., or any combination of any thereof, to engage in the business or act in the capacity of a contractor within the state or to bid a job situated within the state without having a contractor's license. The sections immediately following provide for

the applications for license, examinations thereon, the showing that must be made by the applicant as to experience, financial responsibility, knowledge of building laws, etc., and proceedings for suspension or revocation of licenses, hearings thereon, etc.

NRS § 624.320 reads as follows: "No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business of acting in the capacity of a contractor shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed

contractor at all times during the performance of such act or contract and when the job was bid." NRS § 624.360 makes any violation of the chapter a misdemeanor, punishable by a minimum fine of $50. On the basis of § 624.320 the trial court entered summary judgment for respondents.

[1] Appellants first contend that the entry of a summary judgment under Rule 56, N.R.C.P. is precluded if there is any factual determination remaining for the court or jury. Parman v. Petricciani, 70 Nev. 427, 272 P.2d 492. This is conceded.

(1) They next contend that the second cause of action pleaded in the amended and supplemental complaint alleges fraud and sets up the factual issue for determination by court or jury as to whether the defendants, through the perpetration of such fraud, have attempted unjustly to enrich

themselves; and that if the fraudulent actions of the defendants as pleaded can be proved by the plaintiffs, they are entitled to judgment despite the bar of the licensing statute precluding a recovery of compensation under the contract.

Respondents insist that if the statute can thus be circumvented by allegations such as those made by plaintiffs, then all such statutes can be rendered meaningless and their primary purpose defeated.

[2] We start with the proposition that plaintiffs' second cause of action is not an action on the contract itself or for compensation for its performance, but one to prevent the defendants' unjust enrichment of themselves accomplished by means of the fraud practiced by them upon the plaintiffs.

[3] Various means and remedies have been employed to afford relief outside of the domains of technical contracts and torts. Unjust enrichment, restitution, quasi contract, implied contract, resulting and constructive trusts, accounting, etc. are some of the means thus employed. See 46 Am. Jur. 99-101, Restitution and Unjust Enrichment, for numerous instances and examples. Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900 (hearing denied by the Supreme Court), which afforded relief by accounting in the case of a transaction illegal because of failure to secure a bar permit, was referred to as the leading case on the subject in the later case of Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24 (hearing of Supreme Court denied). There, after approving the general rule on which respondent relied (see Hooper v. Barranti,

81 Cal.App.2d 570, 184 P.2d 688) and after conceding a contrary view expressed in some cases, the court notes numerous cases in which exceptions to the general rule have been recognized. Then, after approving the reasoning in the Denning case as "most convincing", the court says [93 Cal.App. 2d 276, 209 P.2d 31]:

"The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The funda-

mental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied. That is the theory of the Denning case, and of the other cases above cited, and we think it is the correct and more enlightened rule."

[4] Norwood v. Judd may now be considered the leading case on the subject. Decided in 1949, it has been followed or cited with approval in numerous cases from 1954 to 1958. Among these we may note particularly

Grant v. Weatherholt, 123 Cal.App.2d 34, 266 P.2d 185, Wilson v. Stearns, 123 Cal. App.2d 472, 267 P.2d 59, and Kennard v. Rosenberg, 127 Cal.App.2d 340, 273 P.2d 839, as being in point here. In Grant v. Weatherholt [123 Cal.App.2d 34, 266 P.2d 191] the court fully recognized the nullifying effect of the statute. "Plaintiff's contract with the corporation was void. He could not recover on the contract nor for breach of it, nor for the value of work done or for moneys expended thereunder." It said further, however: "The courts will not impose penalties for noncompliance in addition to those that are provided expressly or by necessary implication." If in the instant case we should preclude a remedy against defendants' unjust self-enrichment by means of their own fraud, we would be imposing a penalty beyond and in

addition to that provided by the statute. This, under the reasoning and authorities found in Norwood v. Judd, supra, with which we are in entire accord, we decline to do. Nor on the other hand are we called on to decide, and we do not decide, that mere allegations of fraud without a showing of a resulting unjust enrichment would invoke the powers of the court to afford relief.

(2) Respondents further contend that the allegations of fraud as made by plaintiffs do not present a case of unjust enrichment, but that such theory is presented for the first time on this appeal. They concede that if the statute as an absolute bar must be sustained as to the $12,000 balance claimed by plaintiffs, the same situation would exist if respondents had paid no part of the $130,000 contract and they possessed the entire building without payment

therefor.

[5,6] As to this contention, we are satisfied that under our liberalized rules of pleading these points are not fatal to a recovery. Under Rule 54(c), N.R.C.P. ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." A satisfying analysis of this rule is found in the discussion by Barron & Holtzoff, § 1194, pp. 35-37: "The second sentence of Rule 54(c) provides that in non-default cases the judgment is not limited in kind or amount by the demand for relief, but may include whatever relief the successful party is entitled to, regardless of the demand. This provision implements the general principle of Rule 15(c), that in a contested case the judgment is to be

based on what has been proved rather than what has been pleaded. It is a necessary rule in a merged system of law and equity; indeed the difficulties which some states have had in implementing the merger of law and equity stems from a failure to grasp and to apply this principle. Any rule other than that stated in the second sentence of Rule 54(c) would mean preservation of the distinctions between law and equity and of the various forms of action which these rules are intended to abolish.

[7] "Thus the rule provides that the demand for judgment loses much of its restrictive force if the case is at issue. Particular legal theories of counsel then are subordinated to the court's right and duty to grant the relief to which the prevailing party is entitled whether demanded or not. If a party has proved a claim for

relief the court will grant him that relief to which he is entitled on the evidence regardless of the designation of the claim or the prayer for relief. The prayer for relief may be of help as indicating the relief to which the plaintiff may be entitled, but it is not controlling, and the question is not whether the plaintiff has asked for the proper remedy but whether he is entitled to any remedy."

The above quotation likewise disposes of the significance attached to plaintiffs' prayer for judgment for the balance due under the contract. Such is not the measure of the relief that may be afforded. We are concerned here, not with the amount due as compensation under the contract, but with the amount by which defendants have been unjustly enriched. But see Restatement of Restitution, § 1(e). In Glen

Falls Indemnity Co. v. Golden, D.C.D.1957, 148 F.Supp. 41, 43, the court was confronted with the same question presented here, namely, whether relief in unjust enrichment would be afforded under a complaint alleging fraud. In answering this question in the affirmative, the federal court stated: "The Federal Rules of Civil Procedure, Rule 54(c), 28 U.S.C.A., have carried this principle [that equity may adjust its relief to the proof] into civil actions generally and expressly provide that a party is not bound by his prayer for relief but may receive such relief as the proof shows him to be entitled to."

Reversed with costs and remanded for new trial.

MERRILL, J., concurs.

McNAMEE, J., having become a member of the court after argument and submission of

the case, did not participate in the foregoing opinion.

NEVADA EQUITIES, INC., a Nevada corporation and the Home Indemnity Company, a corporation, Appellants,

v.

WILLARD PEASE DRILLING COMPANY, a Colorado corporation, qualified to do business In the State of Nevada, Respondent.

No. 5442.

Supreme Court of Nevada.
April 30, 1968.

Action by drilling company for balance allegedly due on well drilling contract. The Eighth Judicial District Court, Clark County, Thomas J. O'Connell, J., entered judgment for drilling company, and defendants appealed. The Supreme Court, Thompson, C. J., held that drilling company which held contractors' license for

oil and gas well drilling and was licensed as water well driller was not barred from bringing suit to recover balance allegedly due on contract to drill well to explore for hot mineral water of artesian nature simply because it did not hold specialty license from State Contractors' Board.

Affirmed.

Wiener, Goldwater & Galatz, J. Charles Thompson, Las Vegas, for appellants.

Morse & Graves, Las Vegas, Dufford, Rulan, Uhrlaub & Williams, Grand Junction, Colo., for respondent.

OPINION

THOMPSON, Chief Justice.

This appeal by Nevada Equities and its indemnitor, The Home Indemnity Company, [1] is from a judgment for $32,565 in favor

1. Home Indemnity is a party since it gave bond to discharge a mechanic's lien filed by the drilling company against the property of Nevada Equities.

of Willard Pease Drilling Co., which sum was found to be the balance due on a well drilling contract. The main issue is whether the drilling company is precluded from maintaining suit since, according to the appellants, it did not hold necessary licenses.

The object of the well drilling contract was to explore for hot mineral water of an artesian nature. The drilling company was to deepen a 2000 foot hole at the well site to a depth of 6500 feet. Drilling operations were commenced and continued to a depth of 6993 feet, when a "twist-off" occurred halting further drilling. The finding of water was not a condition of payment. Indeed, apart from the licensing issue, it is conceded that substantial evidence otherwise supports the judgment.

1. Our statutory law governing contractors generally, NRS Chap. 624, provides that one acting in the capacity of a contractor may not maintain an action to recover compensation in the courts of Nevada without alleging and proving that he was a duly licensed contractor as required by "this chapter" at all times during the performance of the contract. NRS 624.320 (italics supplied). The State Contractors' Board is designated as the licensing authority.

[1] Willard Pease Drilling Co. held a contractors' license issued by that Board, classification A6, for oil and gas well drilling. In addition, it was licensed as a water well driller under NRS Chap. 534.[2/]

2. NRS 534.140(1) provides: "Every well driller, before engaging in the physical drilling of a well in the State of Nevada for development of water, shall annually make application to the state engineer for a license to drill."

However, it did not secure the specialty contractors' license described in the Rules and Regulations promulgated by the State Contractors' Board, classification C23a, which NRS 534.140(7) seems to require.[3] Thus, the narrow question presented is whether Willard Pease Drilling Co. is barred from bringing suit by reason of NRS 624.320, simply because, although licensed as a water well driller, it did not hold a specialty license (classification C23a) from the State Contractors' Board. We agree with the district court that, in these circumstances, the drilling company is not barred.

3. NRS 534.140(7) reads: "Before engaging in the physical drilling of a well in this state for the development of water, every well driller . . . shall obtain a license as a well driller from the state contractors' board."

Classification C23a of the Rules of the Board reads: "A well drilling contractor is a specialty contractor whose principal contracting business is the execution of contracts requiring some practical elementary knowledge of geology, hydrology, the occurrence of water in the ground, water levels in wells, the prevention of surface and subsurface contamination and pollution of the ground-water supply; and the art, ability, experience, knowledge, science, and skill to intelligently bore, drill, excavate, case, cement, clean and repair water-wells; or to do any, or any combination of any, or all such boring, drilling, excavating, casing, cementing, cleaning and repairing with hand or powered tools or rigs."

[2] Initially, we note that the bar to the maintenance of an action for compensation (NRS 624.320) precludes contractors who are not licensed under that chapter. The claimant was licensed under that chapter. A comparable provision does not appear in Chapter 534 relating to water well drillers. The penalty therein provided is fine, imprisonment, or both. NRS 534.190. When the statute provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is

not precluded from maintaining an action to recover on the contract. Douglas Lumber Co. v. Chicago, 380 Ill. 87, 43 N.E.2d 535 (1942); Moglen v. Gasper, 4 Misc.2d 368, 158 N.R.S.2d 171 (1956); Lusardo v. Harper, Co.Ct., 116 N.Y.S.2d 734 (1950). Cf. Magill v. Lewis, 74 Nev. 381, 333 P.2d 717 (1958), where an unlicensed contractor was allowed recovery on a theory of fraud and unjust enrichment, but not on the contract.

[3] 2. Next, the claimant substantially complied with the licensing scheme under both chapters. It is not suggested that Willard Pease Drilling Co. was wanting in experience, financial responsibility, or indeed, in any particular detrimental to the safety and protection of the public. It had passed the scrutiny of the Contractors' Board in these respects and was issued a license. We shall not condone a

forfeiture in the absence of any ascertainable public policy requiring us to do so. Latipac, Inc. v. Superior Court, 64 Cal.2d 278, 49 Cal.Rptr. 676, 411 P.2d 564 (Cal. 1966).

3. Finally, we mention that the record in this case contains nothing to indicate that the techniques of drilling for water differ substantially from those employed in drilling for oil and gas. No contention is made that because the drilling company was licensed to drill for oil and gas the techniques utilized were incompetent to drill for water. The lower court found that the drilling company had performed in acceptable fashion, and that finding is not challenged.

We deem other assigned errors to be equally without merit.

Affirmed.

COLLINS, ZENOFF, BATJER and MOWBRAY, JJ., concur.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-244

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a Nevada corporation,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

FRANK ROTHMAN,
2049 Century Park East, 14th Floor,
Los Angeles, Calif. 90067,
Attorney for Respondent.

CHARLES M. STERN,
DAVID GOLDWATER,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1976.

SUBJECT INDEX

Page

Statement of the Case 1

Argument 3

I.

The Decision of the Court of Appeals Was in Harmony With the Familiar and Accepted Rules Governing Summary Judgment 5

II.

The Court of Appeals Properly Performed Its Obligation to Ascertain State Law Regarding an Issue Which Has Not Been Addressed by the Nevada Supreme Court 10

A. The Court of Appeals Properly Concluded That the Nevada Supreme Court Would Follow Those Courts of Other States That Have Refused to Apply Licensing Laws to Situations Beyond the Language or the Policy of the Statutes 10

B. The Court of Appeals Properly Gave Consideration to the Decision of the Nevada District Court which Rejected the Conclusion of the Federal District Court in This Case 13

C. The Decision of the State Contractors' License Board, Which Was Part of the Record Below, Corroborates the Conclusion of the Court of Appeals Concerning the Applicability of NRS 624.320 20

Conclusion 22

INDEX TO APPENDICES

	Page
Appendix A. Decision and Order .....App. p.	1
Appendix B. Supreme Court Rule 224. Judicial Opinions	3
Appendix C. Order Granting Motion to Remand ..	4

TABLE OF AUTHORITIES CITED

Cases	Page
American Construction Co. v. Jacksonville T. & K. W. Ry. Co., 148 U.S. 372, 13 S.Ct. 758 (1893)	4
Bradley v. General Motors Corp., 512 F.2d 602 (6th Cir. 1975)	17
Briscoe v. Compagnie Nationale Air France, 290 F. Supp. 863 (S.D.N.Y. 1968)	9
Brotherhood of Locomotive Firemen, etc. v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 88 S.Ct. 437 (1967)	4
Curry v. Fred Olson Line, 367 F.2d 921 (9th Cir. 1966), cert. denied, 386 U.S. 971, 87 S.Ct. 1165 (1967) 18,	19
Dickinson v. First Nat'l Bank, 400 F.2d 548 (5th Cir. 1968), aff'd, 396 U.S. 122, 90 S.Ct. 337 (1969)	21
Edmonds v. Fehler & Feinauer Construction Co., 252 F.2d 639 (6th Cir. 1958)	7
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) 14, 18,	20
Federal Deposit Insurance Corp. v. Sumner Financial Corp., 376 F.Supp. 772 (M.D.Fla. 1974)	8
Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S.Ct. 176 (1940) 15,	17
Funk v. Tifft, 515 F.2d 23 (9th Cir. 1975)	18
Hunter v. Sutton, 45 Nev. 430, 205 P. 785 (1922)	15
Institute for Essential Housing, Inc. v. Keith, 76 N.M. 492, 416 P.2d 157 (1966)	7
King v. Order of United Commercial Travelers, 333 U.S. 153, 68 S.Ct. 488 (1948)	16

Page

Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 463 F.2d 470 (3d Cir. 1972), cert. denied, 410 U.S. 913, 93 S.Ct. 966 (1973) 21

Lake States Engineering Corp. v. Lawrence Seaway Corp., 15 Mich.App. 637, 167 N.W.2d 320 (1969) 7

Las Vegas International Hotel, Inc. v. Argonaut Insurance Co., No. A 93354 (May 28, 1975) 13, 14, 19, 20, 21

LeMon v. Zelker, 358 F.Supp. 554 (S.D.N.Y. 1972) 9

Local 33, Int. Hod Carriers, etc. v. Mason Tenders, etc., 291 F.2d 496 (2d Cir. 1961) 9

Moen v. Las Vegas International Hotel, Inc., 402 F.Supp. 157 (D.Nev. 1975) 18

Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 440 P.2d 122 (1968) 12

Ormachea v. Ormachea, 67 Nev. 273, 217 P.2d 355 (1922) 15

Peterson v. Allcity Ins. Co., 472 F.2d 71 (2d Cir. 1972) 14

Royal Indemnity Co. v. Clingan, 364 F.2d 154 (6th Cir. 1966) 17

United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1925) 3

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347 (1941) 14, 15, 16

West v. American Tel. & Tel. Co., 311 U.S. 223, 61 S.Ct. 179 (1940) 15, 16

Miscellaneous Page

Opinion of the Attorney General, July 1, 1948-June 30, 1950, pp. 144, 149 (1949) 11

Rules

Federal Rules of Civil Procedure, Rule 56 4
.....5, 9, 22

Nevada Supreme Court Rules, Rule 224 15

Rules of Supreme Court of the United States, Rule 19 3

Statutes

Nevada Revised Statutes, Ch. 624 .....11, 12

Nevada Revised Statutes, Ch. 624.320 ....2, 7, 8, 9
.....10, 11, 13, 19, 20, 22

United States Code, Title 28, Sec. 1292(b) 4

Textbooks

6 Moore's Federal Practice, Par. 56.12, p. 56-334 (2d ed. 1976) 8, 9

Stern, R. and E. Gressman, Supreme Court Practice, Sec. 420 (4th ed. 1969) 4

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-244

UNITED PACIFIC INSURANCE COMPANY, a Washington corporation,

Petitioner,

vs.

MGM GRAND HOTEL, INC., a Nevada corporation,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement of the Case.

While petitioner's statement of the case is generally correct, it contains certain misleading statements which require comment. First, petitioner states that respondent ("MGM") opposed petitioner's motion for summary judgment by contending that the existence of factual issues precluded the granting of the motion (Petition, p. 6); while MGM indeed so contended, it also argued that, without regard to such issues, as a matter of law it was not required to have a contractor's license under the Nevada statute. Second, petitioner characterizes the decision of the court of appeals as having

held that "MGM could maintain the suit notwithstanding that it was acting in the capacity of an unlicensed contractor" (Petition, p. 7); here, petitioner relies upon only the last sentence of the opinion below, which is clearly dictum.* The decision of the court of appeals rested on "two independent reasons" (Petition, Appendix A, p. 4): the purpose of the statute would not be furthered by requiring both MGM and its managing contractor to be licensed as contractors, and the statute by its terms only applies to actions "for the collection of compensation for the performance of any act or contract for which a license is required" (NRS 624.320) Neither of these bases of decision assumes that MGM was "acting in the capacity of an unlicensed contractor," and the court of appeals did not so find.

*This misstatement is repeated at page 18 of the petition, where the decision of the court of appeals is described as

> "holding that where an unlicensed person who acts in the capacity of a contractor can demonstrate the 'builder competence' and 'financial responsibility' which the licensing statute contemplated, he can avoid the penalties ordinarily applicable to unlicensed contractors."

ARGUMENT.

The subject of the instant petition concerns only the application of a state licensing statute to the facts of a particular construction project; given the nature of this case, it is unnecessary to review at length the criteria governing the issuance of a writ of certiorari by this Court, which has stated that it "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925).

Petitioner has failed to show, pursuant to Rule 19 of the rules of this Court, any compelling reason for the granting of the writ in this case. No conflict among the circuits, no important constitutional question, no novel issue requiring this Court's attention, has been shown. The petition represents simply an effort to reinstate a summary judgment which has received considered review in the court of appeals and which, until reversed, had the effect of barring MGM's action on a defense wholly unrelated to the merits of the claim.

Furthermore, it must be pointed out that petitioner here seeks review of a nonfinal judgment—the court of appeals remanded the case for trial and if petitioner prevails on the merits, the whole question of the licensing defense will be moot. While certain unusual circumstances have, on prior occasions, resulted in this Court's issuance of writs of certiorari to review interlocutory decisions of the circuit courts, such decisions generally do not merit review by certiorari.

> "[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it

is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

American Construction Co. v. Jacksonville T. & K. W. Ry. Co., 148 U.S. 372, 384, 13 S.Ct. 758, 763 (1893).

Thus, this Court has denied the petition for a writ of certiorari where the court of appeals has remanded the case to the district court, holding that the case was "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen, etc. v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 438 (1967). This Court's general rule against granting a writ of certiorari to review an interlocutory decision is unaffected by the Interlocutory Appeals Act of 1958, 28 U.S.C. §1292(b), pursuant to which the court of appeals reviewed the instant case. R. Stern and E. Gressman, *Supreme Court Practice* §420 (4th ed. 1969).

Petitioner asserts two reasons for review by this Court, one dealing with application of Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), the other dealing with the ascertaining of state law by a federal appellate court reviewing a diversity case. For the reasons explained below, neither of these subjects raises any significant issue on the record in this case. In applying Rule 56 and in determining applicable Nevada law, the court of appeals followed familiar rules of appellate review; the result below, while unsatisfactory to petitioner (who would prefer to avoid having MGM's claim tried on its merits), involved no aberration from those rules and presents no federal question requiring review by this Court.

I.

The Decision of the Court of Appeals Was in Harmony With the Familiar and Accepted Rules Governing Summary Judgment.

Petitioner's contention that the court of appeals somehow misapplied Rule 56, in reversing the trial court's granting of petitioner's motion for summary judgment, is based upon the erroneous assertion that the court of appeals "adopted" the facts set forth in MGM's opposing affidavits and thereby indulged in improper resolution of factual issues (Petition, pp. 8, 10). Yet all of the facts necessary to support the first basis of the decision were either established or conceded in petitioner's own papers, and the second basis of the decision rested solely on the pleadings.

The relationship between MGM, as owner, and Taylor Construction Company ("Taylor"), as the owner's managing contractor, was established by petitioner's original motion, which contained copies of the contracts between MGM and Taylor [C.R. 213-266] and between MGM and Taylor, on the one hand, and Imperial Glass Co. ("Imperial"), on the other hand [C.R. 285-321]; Taylor's licensed status, while directly established in MGM's opposing papers [C.R. 595], was admitted in petitioner's original motion [C.R. 332] and in its supplemental memorandum of points and authorities in support of the motion [C.R. 771]. Finally, petitioner's original motion virtually conceded that the work at issue "was actually performed by a licensesd contractor [*i.e.*, Taylor]" [C.R. 332], and the opinion of the State Contractors' License Board (which had investigated charges that Taylor had improperly dealt with MGM as an unlicensed contractor), put in evidence by petitioner, recited that Taylor "was the Managing

Contractor in charge of the MGM Grand Hotel project . . ." [C.R. 674]. Petitioner's motion did not contend that Taylor had not acted in the capacity of a contractor, but argued that Taylor's so acting did not exclude the possibility that MGM had acted in the capacity of a contractor and did not excuse any resulting violation by MGM of the Nevada licensing statute [C.R. 332-337]. Thus, the court of appeals correctly perceived petitioner's contention to be that both Taylor and MGM required contractors' licenses. In rejecting that contention, the court of appeals assumed only those facts which petitioner, in making its motion, had asked it to assume and had asserted were undisputed.

Although petitioner states that the decision of the court of appeals "presumbly rests" on assumptions that Taylor had total responsibility for supervising construction of MGM's hotel and that MGM was financially responsible (Petition, p. 10), the decision does not "rest" on those assumptions. In pointing out that Taylor's licensed status meant that the State Contractors' License Board ("the Board") was in a position to monitor the progress of the construction project should doubts arise concerning its financial stability, the court of appeals indicated that the premise of its decision (under the first reason for its conclusion) was the fact that MGM was "operating hand in hand with a licensed contractor" (Petition, Appendix A, p. 6). This rationale does not require assumptions that Taylor had "total responsibility" for supervising the project or that MGM was financially responsible (although such assumptions were justified by the record). Taylor's undisputed status as a licensed contractor was sufficient to support the conclusion of the court of appeals that the Nevada statute did not require MGM also to be licensed.

Even though the decision of the court of appeals does not rest upon improper resolution of factual issues, it is unnecessary for this Court so to determine: the second stated reason for the decision is based entirely on the allegations of the complaint and the clear wording of NRS 624.320, and has nothing to do with any asserted facts. As MGM pointed out in its opening brief before the court of appeals (p. 33), a number of courts have held that statutes such as NRS 624.320 operate to bar only actions for compensation for work for which a license is required and do not apply to actions for damages for breach of contract.* The court of appeals decided that it was far more reasonable to assume that the Nevada Supreme Court would follow these cases, if confronted with the issue, than to assume that that court would stretch the plain words of the statute to effect a drastic forfeiture in a case clearly beyond the policy of the statute. In so concluding, the court of appeals had to look no further than MGM's complaint, and was not obliged to accept any facts as undisputed.

Although petitioner argues, incorrectly, that the decision of the court of appeals rests upon improper resolution of disputed facts, such an argument is manifestly impossible to sustain where it appears that the decision is supportable without regard to any arguable issues of fact. Petitioner contends that MGM's assertion below that material issues of fact precluded the granting of the motion for summary judgment, is inconsistent with MGM's prevailing on petitioner's licensing defense

---

*E.g., *Lake States Engineering Corp. v. Lawrence Seaway Corp.*, 15 Mich.App. 637, 656, 167 N.W.2d 320, 331 (1969); *Institute for Essential Housing, Inc. v. Keith*, 76 N.M. 492, 494, 416 P.2d 157, 158 (1966); *Edmonds v. Fehler & Feinauer Construction Co.*, 252 F.2d 639, 642 (6th Cir. 1958).

as a matter of law (Petition, p. 8). There is no merit to this contention. MGM argued below that NRS 624.320 was, on its face, inapplicable to the situation in which an owner hires a licensed contractor as its managing contractor (App. Op. Br. pp. 27-32); MGM further contended that even if the statute could be read in a way which would permit such an owner to be defined as a "contractor," a material issue of fact existed as to whether MGM had indeed acted in that capacity (App. Op. Br. pp. 37-38). Because the court of appeals accepted the former contention, it correctly concluded that it was unnecessary to reach the latter contention. Thus, MGM's argument below concerning the existence of factual issues was not inconsistent with the position, accepted by the court of appeals, that those issues need not be considered, given the clear inapplicability of NRS 624.320 to the facts set forth in petitioner's moving papers.

> "Even where the non-movant vigorously opposes a motion for summary judgment on ground [sic] triable issues of fact exist, the trial court is not precluded from entering summary judgment for the non-movant if, in reality, no factual dispute exists and the non-movant is entitled to summary judgment as a matter of law."
>
> 6 *Moore's Federal Practice* ¶56.12, at 56-334 (2d ed. 1976).

See also Federal Deposit Insurance Corp. v. Sumner Financial Corp., 376 F.Supp. 772, 776 (M.D.Fla. 1974).

With respect to the contention that MGM has improperly been granted partial summary judgment, it must be noted that petitioner's answer [C.R. 49-60]

did not raise any defense based upon the Nevada licensing statute; that defense was tendered for the first time when, more than a year after the commencement of the action, petitioner and Imperial invoked NRS 624.320 in moving for summary judgment. Had the district court correctly ruled upon the motion, in conformity with the views expressed by the court of appeals, it would not have granted partial summary judgment to MGM (there being no issue in the pleadings regarding NRS 624.320), but would simply have ruled against petitioner on the issue of law tendered by its motion. There is, of course, no guarantee that a party moving for summary judgment under Rule 56 will prevail on the legal issues presented by his motion, even if he succeeds in showing an absence of issues of material fact; in many instances federal courts have indeed granted summary judgment to parties opposing the motion, even though they have not made cross-motions of their own. *E.g., Local 33, Int. Hod Carriers, etc. v. Mason Tenders, etc.*, 291 F.2d 496, 505 (2d Cir. 1961); *Briscoe v. Compagnie Nationale Air France*, 290 F.Supp. 863, 867 (S.D.N.Y. 1968); *LeMon v. Zelker*, 358 F.Supp. 554, 555 (S.D.N.Y. 1972). *See also* 6 *Moore's Federal Practice* ¶56.12 (2d ed. 1976). However, the granting of summary judgment to the non-moving party is not at issue here, because no such order was made below; the court of appeals has simply held that petitioner was not entitled to prevail on the legal theory which it had chosen to present by its motion. Certainly no significant question under Rule 56 is presented by such a result.

II.

The Court of Appeals Properly Performed Its Obligation to Ascertain State Law Regarding an Issue Which Has Not Been Addressed by the Nevada Supreme Court.

Petitioner recognizes that in ruling upon the order granting summary judgment, the court of appeals was required to ascertain Nevada law regarding an issue never ruled upon by the Nevada Supreme Court (Petition, p. 11). Petitioner's argument that the court of appeals improperly discharged this function rests upon the interrelated contentions that the court of appeals (a) should have assumed that the Nevada Supreme Court would have adopted California opinions construing the California licensing statute, and (b) should have disregarded the decision of the Nevada trial court which had, on like facts, rejected the position that NRS 624.320 bars damage actions by owners who have retained licensed managing contractors. Both contentions lack merit. Because the ascertainment of state law by the court of appeals was entirely in conformity with established principles prevailing in diversity cases, there is no compelling reason for this Court to perform that task *de novo*.

A. The Court of Appeals Properly Concluded That the Nevada Supreme Court Would Follow Those Courts of Other States That Have Refused to Apply Licensing Laws to Situations Beyond the Language or the Policy of the Statutes.

In arguing the applicability of various California decisions under the California licensing law, petitioner simply repeats its reliance upon the cases discussed in its brief in the court of appeals. As pointed out in MGM's reply brief in the court of appeals, none of these cases deals with the situation of an owner's retaining

a licensed general contractor who acts as managing contractor. Petitioner relies chiefly on cases dealing with parties which are undeniably engaged in the contracting business, which hold themselves out as such, and which render services as contractors; in resisting the application of licensing statutes such as NRS 624.320, such parties do not deny they are "contractors" but usually assert that the invalidity of their licenses is attributable to wholly technical defects, or that their contracting activity substantially complied with the law because someone on the job was duly licensed. Other cases cited by petitioner deal with parties who are not regularly engaged in the contracting business but hold themselves out to the public as ready and able to perform contracting services. None of these cases has any bearing on the status of an owner (like MGM) which is *not* in the contracting business, which does *not* hold itself out to the public as a contractor, and which does *not* purport to have the expertise as a contractor necessary to build a multimillion dollar structure.* Petitioner incorrectly states that the court of appeals recognized the existence of cases barring an action "under these same circumstances" (Petition, p. 11)—the cases referred to (cited in footnote 11 of the decision below—Petition, Appendix A, p. 6) did *not* deal with "these same circumstances," but were cited only to acknowledge that the licensing laws have been applied, outside Nevada, to bar actions for breach

*The Nevada Attorney General, in construing the predecessor of NRS chapter 624, has stated that the statute was intended by the legislature "to provide a policing measure governing the activities of all persons who act as independent contractors *and hold themselves out as persons qualified and capable of entering into and performing all or some of the activities set forth in [the statute]*." Op. Att'y Gen. July 1, 1948 to June 30, 1950 144, 149 (1949) (Emphasis added).

of contract as well as actions for compensation for services.

It is also untrue, as petitioner asserts, that the Nevada Supreme Court has "relied almost totally on California precedent" in construing NRS chapter 624, (Petition, pp. 11-12); the Nevada case referred to in the decision of the court of appeals, *Nevada Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968) (Petition, Appendix F, pp. F-18 to F-25), relies principally upon decisions from Illinois and New York and cites a California decision only to emphasize the point argued below by MGM, *i.e.*, that a forfeiture is not to be condoned absent any ascertainable public policy so requiring. The fact of the matter is that appellate decisions throughout the country construing contractors' licensing laws are relatively few; these opinions, such as they are, necessarily resort to whatever pertinent cases may exist in the reports of sister states, depending upon similarity of facts and persuasiveness of reasoning. Nothing in Nevada law indicates that the Nevada Supreme Court has chosen in this area to follow California law—or the law of any other state—without regard to the facts of the particular case and the policy considerations raised by those facts. Having argued successfully below that the California licensing law cannot apply to a construction project in Nevada (Petition, Appendix C, pp. C-22 to C-33), petitioner now argues, in effect, that while Nevada may properly insist on applying its own statute to construction projects in Nevada, it is obliged to construe its statute in conformity with California decisions interpreting the California statute. The court of appeals correctly refused to find such an obligation and properly opined that on the facts of this case

the Nevada Supreme Court would pronounce Nevada law in a manner consistent with the words and the purpose of NRS 624.320, both of which are incompatible with the position advanced in petitioner's motion for summary judgment. Petitioner fails to explain why it was improper for the court of appeals to assume that the Nevada Supreme Court would follow the decisions of the courts in Michigan and New Mexico, and the Court of Appeals for the Sixth Circuit (applying Kentucky law), which have held statutes similar to NRS 624.320 not to apply to actions for damages for breach of contract,* rather than decisions from California and New Mexico, which have reached the opposite conclusion. It is apparent that petitioner is aggrieved not because the court of appeals attributed to the Nevada Supreme Court a position unsubstantiated by logic or case law from other states—such substantiation clearly exists—but because the court below did not pronounce Nevada law to be as petitioner wishes it to be. This dissatisfaction with an entirely reasonable result hardly merits the issuance of a writ of certiorari.

B. The Court of Appeals Properly Gave Consideration to the Decision of the Nevada District Court Which Rejected the Conclusion of the Federal District Court in This Case.

While the appeal below was pending in the court of appeals, the Nevada District Court, sitting in Clark County, handed down a written opinion in the case of *Las Vegas International Hotel, Inc. v. Argonaut Insurance Co.*, No. A 93354 (May 28, 1975) (Appendix A to this brief). In that case, the court denied defendant's motion for summary judgment, which motion was based on facts similar to those of the instant

*See citations in footnote, page 7, *supra*.

case and on the same legal contention asserted by petitioner in the instant case; in denying summary judgment, the Nevada court expressly rejected the reasoning of the federal district court which had granted summary judgment herein. The court of appeals recognized that it was not bound by this state court opinion but did "regard it as persuasive authority" in support of its decision to reverse (Petition, Appendix A, p. 4, n.5). Petitioner argues that the state court opinion "should not have been considered" below (Petition, p. 14). As it did in its brief to the court of appeals, petitioner oversimplifies the issue, insisting that absent a controlling decision by the Nevada Supreme Court, any indicia of state law not in conformity with petitioner's position be summarily and entirely disregarded. The court of appeals, cognizant of its duties under *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938), properly refused to adopt the simplistic analysis espoused by petitioner.

MGM did not (and does not) contend that the court of appeals was bound by the decision of the state court in the *International Hotel* case. However, it was entirely proper for the court of appeals to give some consideration to that decision; such consideration was virtually obligatory under *Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347 (1941), which makes it clear that a federal appellate court reviewing a diversity case must take into consideration pronouncements of state law which are made after the time of the decision under review. *See also Peterson v. Allcity Ins. Co.,* 472 F.2d 71, 79 n.12 (2d Cir. 1972). While the Court in *Vandenbark* spoke in terms of the lower appellate court's duty "to apply state law . . . in accordance with

the then controlling decision of the highest state court" (311 U.S. at 543, 61 S.Ct. at 350), both parties in the instant case acknowledge that the highest court of the state (*i.e.,* the Nevada Supreme Court) has never decided the issue ruled upon below. Petitioner recognizes the pertinence of *Vandenbark:* it does not challenge the relevance of the Nevada state court decision on the ground that the decision came after the ruling of the federal district court, but rather on the ground that the decision emanated from a state trial court.*

Were *Vandenbark* the last word from this Court in the pertinent area of *Erie* jurisprudence, it might be argued that *Vandenbark* is limited to situations involving intervening decisions from "the highest court of the state." That position was expressly rejected in *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 61 S.Ct. 176 (1940), and *West v. American Tel. & Tel. Co.,* 311 U.S. 223, 61 S.Ct. 179 (1940). In the latter case, this Court stated as follows:

> "A state is not without law save as its highest court has declared it. There are many rules of deci-

*Petitioner has cited wholly inapplicable authorities in attempting to show that the decision of the Nevada District Court is a nullity. Rule 224 of the Nevada Supreme Court (presumably referred to at page 14 of the petition, there being no "Rule 244"—petitioner cited Rule 224 in its brief before the court of appeals) says nothing whatever about the weight of trial court opinions. (A copy of Rule 224 is set forth in Appendix B of this brief.) *Ormachea v. Ormachea,* 67 Nev. 273, 217 P.2d 355 (1922) (Petition, pp. 14-15), dealt neither with a summary judgment nor with the issue of the value as precedent of a trial court opinion; the portion of *Ormachea* cited by petitioner, and the corresponding portion of *Hunter v. Sutton,* 45 Nev. 430, 205 P. 785 (1922) (Petition, p. 15), concerned the effect of a trial court opinion on an appeal from the very decision in which that opinion was rendered (67 Nev. at 295; 45 Nev. at 439).

sion commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain *from all available data* what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts" (311 U.S. at 236-237, 61 S.Ct. at 183; emphasis added).

The very case relied upon by petitioner, *King v. Order of United Commercial Travelers,* 333 U.S. 153, 68 S.Ct. 488 (1948) (Petition, p. 14), teaches that the federal circuit court will properly attribute some weight to the decision of the state trial court on a question of first impression; significantly, in *King* the federal circuit court had considered a subsequent state court decision which (unlike the Nevada court decision here) relied upon the very decision on appeal in the federal court (333 U.S. at 156-157, 68 S.Ct. at 490). Furthermore, in *King* this Court cited *Vandenbark* in justifying its consideration (although "not as a controlling factor") of a second state trial decision handed down during the pendency of the appeal in this Court (333 U.S. at 162, 68 S.Ct. at 493).

The rationale of *Fidelity Union Trust Co.* and *West* finds expression in the more recent case of *Royal Indemnity Co. v. Clingan,* 364 F.2d 154 (6th Cir. 1966), which provides an exact parallel to the sequence of events in the appeal of the instant case below. In *Royal Indemnity,* the federal district court had decided a question of Tennessee law as to which there was no precedent in the reported decisions of the Tennessee appellate courts. Appellant cited to the federal appellate court an unreported decision of a Tennessee court of original jurisdiction, handed down some months after the decision by the federal district court; the state court expressly declined to follow the decision of the federal district court. Reversing (in pertinent part), the appellate court gave weight to the state court's decision in determining the controlling law of Tennessee in the case before it, and concluded that the Tennessee Supreme Court would reach the same conclusion as that reached by the lower state court; the appellate court remarked that the state court decision "was not available to the district judge at the time he rendered his opinion in this case" (364 F.2d at 158). *Royal Indemnity* was followed in *Bradley v. General Motors Corp.,* 512 F.2d 602, 605 (6th Cir. 1975), wherein the court of appeals declared that it "may give weight to the decision of a [state] trial court in determining what is the controlling law of Tennessee." Furthermore, the United States District Court for the District of Nevada itself has recently turned to a Nevada trial court decision in determining Nevada law regarding issues not addressed by the Nevada Supreme Court, finding in that decision "persuasive authority with respect to the proper interpretation of

the [pertinent] Nevada statute." *Moen v. Las Vegas International Hotel, Inc.*, 402 F.Supp. 157, 159 (D. Nev. 1975).

The court of appeals was not bound by the district court's legal conclusions concerning state law in the instant diversity case. *Funk v. Tifft*, 515 F.2d 23, 25 (9th Cir. 1975). Ascertainment of that law was the task of the court of appeals in reviewing the order granting summary judgment, and, by virtue of the cases cited above, the task included taking into consideration the state court decision which was rendered during the pendency of the appeal. The court of appeals did not regard the state court decision as having foreclosed the issue of state law before it in the instant case, but simply pointed out that the state court decision supported its conclusion. In treating the state court decision as a helpful indication, rather than a controlling determination, of Nevada law, and in providing convincing reasoning for its opinion concerning what the Nevada Supreme Court would declare that law to be, the court of appeals correctly performed its duty of appellate review consistent with recognized *Erie* principles.

Petitioner would have this Court believe that the Ninth Circuit departed from precedent in giving consideration to a state trial court's decision in the instant case; petitioner cites *Curry v. Fred Olson Line*, 367 F.2d 921, 924 n.10 (9th Cir. 1966), *cert. denied*, 386 U.S. 971, 87 S.Ct. 1165 (1967), as a case in which the court of appeals "refused to give . . . weight to California trial court decisions" (Petition,

p. 15). This is a highly misleading characterization of the cited case—in *Curry*, the court of appeals did indeed look to state trial court opinions for guidance as to applicable state law, but noted that the two opinions referred to cited no prior authority and stated that "[t]hese decisions are of little help to us." Implicit in footnote 10 of the *Curry* opinion is the assumption that the state trial court decisions there referred to were not automatically disregarded because of their origin, were indeed relevant as pronouncements of state law (as no California appellate court had passed on the issue at bar), but were simply unilluminating and were less helpful as indicia of state law than related statutes and state appellate decisions that indicated more clearly how the California Supreme Court would presumably rule on the question at issue (367 F.2d at 926-928).

It should be noted that although petitioner attempts to raise a spectre of uncertainty in the law resulting from the ruling below, that ruling serves the fundamental interest of certainty in diversity cases that *Erie* and its progeny aimed to achieve. The court of appeals has not presumed to interpret the contractors' license statute of any state other than Nevada, and has construed the Nevada statute in the same way as the Nevada District Court. The decision of the court of appeals deprives litigants in Nevada of any undue advantage which might otherwise be gained in maneuvering a case involving NRS 624.320 into, or out of, the state court which decided the *International Hotel*

case, as opposed to the United District Court for the District of Nevada; such forum shopping might well have resulted had not the court of appeals reversed the decision of the federal district court.*

No aberration from familiar *Erie* principles can be shown in the decision of the court of appeals, and nothing in that court's ascertainment of state law warrants the issuance of a writ of certiorari.

C. The Decision of the State Contractors' License Board, Which Was Part of the Record Below, Corroborates the Conclusion of the Court of Appeals Concerning the Applicability of NRS 624.320.

The record before the court of appeals included a transcript of the Board's proceedings wherein the Board had investigated the MGM Grand Hotel project and concluded that Taylor had not aided and abetted, or entered into a contract with, an unlicensed contractor in dealing with MGM [C.R. 579-596, 611-660]. More specifically, the Board determined that Taylor "was acting as a general contractor for MGM" and that MGM "was not required to be licensed by the Board" [C.R. 596]. Although not referred to in the decision of the court of appeals, the Board's determination

*After the denial of its motion for summary judgment in the *International Hotel* case, the defendant removed the case to the United States District Court for the District of Nevada; it would seem clear that the obviously untimely petition for removal (filed in December of 1975, more than four years after commencement of the action) was prompted by the desire to take advantage of the prior ruling of the federal district court in the instant case. The federal district court rejected this ploy and granted the plaintiff's motion to remand to the state court (see Appendix C to this brief). Thus, efforts at forum shopping were already apparent in Nevada before the court of appeals precluded such efforts by reversing the decision of the federal district court.

provides further evidence of the correctness of that decision. A state agency's ruling

> "may sometimes constitute the only 'law' of the state . . . and [should be followed] when . . . it appears consistent with the policy of the state statute."
>
> *Dickinson v. First Nat'l Bank,* 400 F.2d 548, 558 (5th Cir. 1968), *aff'd,* 396 U.S. 122, 90 S.Ct. 337 (1969).

See also Knuth v. Erie-Crawford Dairy Cooperative Ass'n, 463 F.2d 470, 482-483 (3d Cir. 1972), *cert. denied,* 410 U.S. 913, 93 S.Ct. 966 (1973).

While the decision of the court of appeals did not rely upon the Board's determination that MGM did not require a contractor's license, that determination is nevertheless relevant to the instant petition. It is petitioner's contention that the decision of the court of appeals poses a threat to the effectiveness of the contractors' licensing laws in five states (two of which are not even part of the Ninth Circuit), because it "is contrary to the holding of virtually every state court which has ruled on this issue . . ." (Petition, p. 18). In fact, no state appellate court has "ruled on this issue"—if there is such a reported ruling, it escaped all the briefs presented to the court of appeals and is obviously absent from the instant petition—and the one state trial court which is known to have ruled on the issue (the Nevada District Court in the *International Hotel* case) rejected petitioner's position. The decision below dealt only with the situation of an owner who retains a licensed general contractor as his managing contractor, and dealt only with the contractors' licensing statute in the State of Nevada; when any state or federal court is called upon to construe the contractors' licensing statute of some other state,

nothing in the decision below will require a result inconsistent with the perceived scope of that other statute. Furthermore, it cannot legitimately be argued that the decision below poses any threat to the State of Nevada when the duly empowered agency of that state has found no violation of the statute on the very construction project here at issue. The bugaboo raised by petitioner could conceivably constitute a genuine concern, had the decision of the court of appeals contravened some pronouncement of the Board or the Nevada courts to the effect that MGM, or similarly situated owners, require licenses despite their retention of licensed managing contractors. But, as pointed out above, both the Board and the state judiciary have spoken precisely to the contrary, in harmony with the decision below. The false fears raised in the petition merit no attention by this Court.

Conclusion.

The court of appeals correctly determined, under familiar standards governing Rule 56, that petitioner was not entitled to summary judgment; that determination did not rest upon any improper assumptions of facts. The court of appeals reversed the summary judgment entered by the district court because the appellate court concluded, after sound analysis of the purpose and scope of NRS 624.320, that the lower court had applied the statute to a situation it was not intended to reach. In so ruling, the court of appeals properly ascertained Nevada law on a question never addressed by the Nevada Supreme Court, finding guidance in a state court opinion handed down during the pendency of the appeal. The decision below is well supported by the case law governing its process of ascertaining

state law in a diversity case and by the logic of its result. Neither the process nor the result of the decision of the court of appeals warrants review by this Court; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK ROTHMAN,
Attorney for Respondent.

CHARLES M. STERN,
DAVID GOLDWATER,
Of Counsel.

APPENDIX A.

Case No. A 93354, Dept. No. VI.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

Las Vegas International Hotel, Inc., Plaintiff, vs. Argonaut Insurance Company, Defendant. Argonaut Insurance Company, Cross-Plaintiff, vs. Las Vegas International Hotel, Inc., Cross-Defendant.

Filed: May 28, 1975.

Decision and Order.

Plaintiff initiated this action August 31, 1971, because of defendant's alleged failure to fully and satisfactorily perform a contract entered into December 2, 1968, between Taylor of Nevada, Inc. as general contractor for plaintiff owner and the defendant. On February 26, 1975, defendant filed a motion for summary judgment on the specific ground that plaintiff cannot prove that it is a duly licensed contractor under the laws of this state and therefore is precluded by statute from recovering. Relying upon the facts as they have been tendered to the Court by both parties, without further inquiry, the Court is not persuaded that defendant is entitled to judgment as a matter of law.

Defendant relies heavily on the recent order granting summary judgment in *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, (Civil LV 2032) in the United States District Court of Nevada, wherein that court was confronted with a situation much like that presented in the instant case. This Court is not necessarily of the opinion that the trial judge was correct in his finding that an owner who employs a managing contractor is itself a contractor within the purview of

NRS 624.020(2) which provides, inter alia, that any person[1] who ". . . does himself or by or through others construct . . . any building. . . ." is a contractor. However, assuming arguendo that such a proposition is correct, the Court is not now persuaded that plaintiff's right to satisfactory performance on the various subcontracts involved should be foreclosed for failure to possess a valid Nevada contractor's license.

NRS 624.320 simply prohibits one acting in the capacity of a contractor from maintaining any action ". . . for the *collection of compensation* for the performance of any act or contract for which a license is required. . . ." (Emphasis added.) This Court cannot agree with the Federal judge's extension of such prohibition, just as it cannot agree that the failure to possess such a license, an unlawful act (NRS 624.230), automatically taints all contracts of the owner.

That the statutory scheme of NRS Chapter 624 was designed to protect the public goes without question, but the prohibition laid down in *MGM* can hardly be said to be in the interest of the public. *MGM* sanctions the anomalous situation of relegating an owner to a position where it cannot protect the public from the shoddy workmanship of its subcontractors if it cannot enforce the latter's bond which has been given to secure such a lack of solicitude.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

DATED this 28th day of May, 1975.

/s/ Howard Babcock
DISTRICT JUDGE

---

[1]The term "person" includes an individual, firm, copartnership, corporation, association or organization, or any combination thereof. NRS 624.030.

APPENDIX B.

Rule 224. *Judicial opinions.*

1. In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

2. It is desirable that justices of the supreme court, in reversing cases and granting new trials, should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

3. But the volume of reported decisions is such and is so rapidly increasing that, in writing opinions which are to be published, justices of the supreme court may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

4. It is of high importance that the justices of the supreme court should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A justice of the supreme court should not yield to pride of opinion or value more highly his individual reputation than that of the court, to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in the supreme court.

APPENDIX C.

In the United States District Court for the District of Nevada.

Argonaut Insurance Company, Petitioner, vs. Las Vegas International Hotel, Inc., Respondent. Civil LV 75-234 RDF.

Order Granting Motion to Remand.

The motion of respondent (plaintiff) to remand, filed December 16, 1975, is granted.

Within 10 days after respondent's (plaintiff's) costs are fixed, in accordance with Local Rule 20, the petitioner (defendant) shall pay the same. If not so paid, petitioner (defendant) shall have judgment against Safeco Insurance Company upon its removal bond for the amount of costs allowed, not to exceed $250.00.

Pursuant to Local Rule 13, petitioner's (defendant's) counsel will show cause before this Court at 10:00 A.M., Friday, January 9, 1976, why sanctions sought by respondent (plaintiff) should not be imposed against him.

Dated: December 19th, 1975.

Roger D. Foley
DISTRICT JUDGE